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COMMENTARIES
ON THE
LAW OF SCOTLAND,
RESPECTING THE
DESCRIPTION AND PUNISHMENT
OF
CRIMES.

BY
DAVID HUME, Esq. ADVOCATE,
PROFESSOR OF THE LAW OF SCOTLAND, IN THE UNIVERSITY
OF EDINBURGH.

IN TWO VOLUMES.

VOL. I.

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AND E. BALFOUR.

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INTRODUCTION.

I NOW offer to the Public, the substance of those observations on the description and punishment of Crimes, which, in the discharge of my duty, as Professor of the Law of Scotland in the University of Edinburgh, I have for some years had occasion to deliver, as part of a course of Academical Lectures. And when I give them this form, for which I cannot plead the same obligation, I am sensible that some apology is due to my countrymen, and more especially to my Brethren at the Bar, for the boldness of the undertaking.

IN one, however, and the principal excuse, I hope to be in some measure anticipated by the reader. It is this : That I am not professing to give him new light on a subject which has been already handled by accurate and able authors ; but am only introducing him to the elements of a part of our practice, upon which, important as it is, the lawyer may almost be said to be without one printed authority to resort to.

WHEN I say so, I am far from intending (I know indeed that such an attempt would be fruitless, and prudence, if not

not a sense of justice, would restrain me) to depreciate the merits of the *Treatise concerning the Law of Scotland in Matters Criminal*, published in 1678, by that eloquent and ingenious lawyer, Sir George Mackenzie. Certainly, whatever may be its imperfections, his work was a valuable present to the lawyers of his day; and this I may safely say, that if we were possessed of any general system applicable to the practice of our times, and written with the same learning and ingenuity, or containing the like detail of the judgments of Court, and of the rules of our municipal custom, the present publication would never have seen the light. But it is well known, that with the exception of *Maclaurin's Criminal Cases*, and those since published by Mr Arnot, which are but a partial selection, and do not propose to give any general exposition of the law, later times have added almost nothing to our stock of knowledge in this department. It is true that Erskine, in his valuable *Institute of the Law of Scotland*, professes to treat of the rules as well of our Criminal as of our Civil Practice. But of this part of his work, which at any rate is much too brief to be of any material service in real business, I may be allowed to say, (for in this I am not pretending to lead, but am following the public opinion), that it is not of the same high authority as the other; nor has been formed upon the same accurate and extensive research into the records and decisions of Court, which are the only key to the peculiar practice of Scotland respecting crimes. The same remark is no less applicable to Mr Forbes's *Institute of the Criminal Law*; which is little more than a set of hasty notes of the contents of our statutes, without any inquiry into what has been argued or decided.

THUS, on the whole, the lawyer has to gain his knowledge of this, certainly the noblest and most interesting part
of

of his profession, from the perusal of one work, composed upwards of a century ago, and in times so very different from the present, that, even if it were in every instance an accurate and faithful delineation of the law and practice as they then stood; still it would be found to give a very defective, and often erroneous account of what is now the law, and to require a very ample commentary, to accommodate it to the uses of our day.

THIS will not appear surprising to one who considers the great change which has happened since the time of Sir George Mackenzie, in the manners, and temper, and way of thinking of the nation; by which the state of its Criminal Law, and its application to real business, must always, in a great measure, be affected. For although, in any tolerably well governed country, the decision of an individual case ought, and in general does depend, not on the wishes and feelings of the people, or any part of the people, with respect to the persons concerned, but solely on the letter of the law and the state of the fact; yet the general spirit of that law will always, in some measure, be bent and accommodated to the temper and exigencies of the times; directing its severity against those crimes which the manners of the age breed a direct abhorrence of, or which the present condition of the people renders peculiarly hurtful in their consequences to private or to public peace. The method, too, of detecting crimes, and of carrying on the trial, must be affected by the manners of the people; since the course of process will naturally vary, according as there is more or less danger that justice will be perverted, or frustrated, by falsehood and corruption, by private malice, or by the rancorous animosity of civil dissensions.

THE law of civil rights undergoes its changes too, as the state of a people in regard to its political situation alters; but the changes are never so rapid, nor so extensive, as in the criminal jurisprudence. One strong reason for which is, that with respect to the former, although it may often be a subject of inquiry to the understanding, whether one or other practice be the more expedient; yet in the greater number of cases, our moral feelings are altogether indifferent; which they never can be on a question whether a particular action or course of conduct is or is not a fit object of punishment. There are some of our civil institutions, which perhaps might be altered with advantage; but still there is no feeling of dislike or abhorrence of the persons who enjoy what the present law gives them; nor any very strong sympathy and compassion towards those who are deprived of some advantages, which, on a different plan, might have fallen to their lot. And thus the practice of old times extends to the present, without giving us any shock or uneasiness. Now, it is quite otherwise in the matter of crimes. Take, for instance, the case of witchcraft. The possibility of such a crime was once believed; and the methods of detecting it were also thought to be properly, and even ingeniously, contrived. But we have recovered from this strange and miserable delusion: and I am sure it will not be disputed, that even if the statute which forbids any prosecution for this crime had not been enacted, yet the manners and temper of the age would effectually have abrogated the ancient law; and would have suffered no such trials to be attempted, as our ancestors, at no very distant period, often witnessed without disapprobation.

FROM

FROM this natural correspondence between the state of the Criminal Law, and the condition of the people as to its manners and ways of feeling, it will easily be understood why Sir George Mackenzie's treatise should be defective in its application to our present practice. For at the time of its publication, this country had advanced but little in any sort of improvement; and indeed, whether we consider it with respect to the administration of its Government, its internal discipline and œconomy, or the opinions, temper, and habits of the people, it was at that time utterly remote from what Scotland has since become.

IN this penury, therefore, of information, having, in the course of my duty as Public Teacher of the Law, particularly directed my attention to the department of Crimes; and having gone over the whole series of the *Books of Adjournal*, (for so the records of the Court of Justiciary are called); I hope I may at least be excused for the attempt of saving others the labour of the like research, for which not many persons can be supposed to have either leisure or inclination.

ONE other motive, and I trust not an unworthy one, has, I confess, thus far at least had weight with me, that it has determined me to make this publication earlier, than perhaps I should otherwise have been disposed to. I mean the desire of rescuing the law of my native country from that state of declension in the esteem of some part of the public, into which, of late years, it seems to have been falling; owing, I am persuaded, to this more than any other cause, that they are ignorant of what it really is. This disposition, in particular, appears in those multiplied references to the

the Criminal Law of England, and those frequent and extravagant encomiums on the English practice, in preference to our own; which, in any point where the two differ, is calumniated as rude and barbarous, nay is sometimes even spoken of as grievous and oppressive. This is an opinion, which, for my own part, I am unwilling to learn; and in which I have not yet found any preceptor, who had sufficient skill or eloquence to persuade me. So far from it, that all such invectives, indecent and hurtful as they certainly are, appear to me withal to be unjust and groundless in themselves; and to proceed upon a very partial and narrow view of the subject.

THAT the Law of England respecting Crimes is a liberal and enlightened system, (having gradually ripened, by the experience of ages, among a people who well understand the nature of a rational and moderate freedom); and that as such,—as a body of written wisdom,—it is entitled to deference, and may with propriety be quoted in those matters which our own customs or statutes have not settled:—All this, what reasonable person will dispute? Farther; I will readily admit, that in many things our practice has not yet attained to the same maturity and consistency as that of our sister kingdom: That offences are not reduced, throughout, in their description and several divisions, to the same orderly and systematic shape; and that we have still to settle many points of our form of process, which have long ceased to be the subject of controversy in the English Courts. But of all this, how true soever, I have only to observe, that how should we expect to find the case otherwise, in comparing our law with that of a country, where, from the much greater number of dissolute and profligate people, and from
the

the greater progress of every refinement, and of every sort of corruption, crimes are both more frequent, and far more various in their nature, than among ourselves; so that through the greater number of trials, and the repeated application to every sort of offence, their law forms a more complete system, and extends its rules, drawn from actual decisions, to a greater number of questions. But will it therefore be said, that, purely by way of fixing things, it would be right to extend the whole of this enormous code to Scotland, where the same evils are not yet known, and the same questions have not yet occurred? Or, on the other hand, is it to be conceived, that there would be good sense or propriety in adopting this or t'other article of the English practice, without regard had to its suitableness or analogy, either to our general system, or to the circumstances of the department of practice on which it is to be engrafted? Surely it is a shortsighted and narrow wisdom, which thus takes up the several points of practice separately and by themselves; when nothing is more certain, than that every one part has more or less relation to another; and that many things, which, considered singly, may seem to be too rigorous, or too indulgent, are, however, when examined as parts of one whole, found to be neither way excessive, but altogether suitable and proper; being coupled to other provisions of an opposite tendency, which serve to counteract them, and to hinder the evil that might otherwise ensue. Now, if this be true of the different parts of any one system of law, it ought to teach us the greatest diffidence and caution in comparing the laws of different countries, even when both are fully known to us; and much more, (as in our case), when our acquaintance with one of them is so imperfect.

AMONG

AMONG many instances that might be given, I shall mention but one, of this fancied excellence of the Law of England being in a great measure a delusion, which has sprung from the looking to only one rule in the criminal process, without attending to the others. What I allude to is the complaint which we often hear, of our want of the peremptory challenge of the jurors, and of that punctilious and critical precision respecting the terms of the indictment and record, which is observed in the English Courts. But those who expatiate on this grievance, entirely forget, that, (except in case of treason, by provision of modern statutes), no prisoner in England sees his indictment, or knows what the charge against him is, till he stands arraigned on it in the face of Court; and that he is till then in equal ignorance who the persons are that are summoned to his jury, and who the witnesses that are to be used against him. Whereas with us, he must have full information in all these important articles, fifteen days at least before his trial; and has thus far better opportunity than the prisoner in any trial before an English Court, to discover and prepare any reasonable objections that may lie to the indictment, witnesses, or jurors, or any of them. He has too with us the farther advantage, in every instance, of Counsel to address the jury, and conduct his defence; which no prisoner in England has upon the issue of guilty or not guilty, in any capital case, except in trials for treason. And here, with reference to the indulgence which is shown in these particulars to such who are under trial for that high crime, I cannot forbear to insert the observations of Sir Michael Foster on that occasion. "The furnishing the prisoner
" with the names, professions, and places of abode of the
" witnesses and jury, so long before the trial, may serve many
" bad purposes, which are too obvious to be mentioned, One
" good

“ good purpose, and but one it may serve. It giveth the
 “ prisoner an opportunity of informing himself of the cha-
 “ racter of the witnesses and jury. But this single advan-
 “ tage will weigh very little, in the scale of justice or sound
 “ policy, against the many bad ends that may be answered
 “ by it. However, if it weigheth any thing in the scale of
 “ justice, the Crown is entitled to the same opportunity of
 “ sifting the character of the prisoner’s witnesses.” Surely Crown Law,
 it ought to be a lesson to us, of the moderation and diffi- P. 250.
 dence to be observed with respect to all opinions on subjects
 of this kind, when we find this able and excellent author,—
 an author too, who has distinguished himself as a popular
 lawyer, and strenuous advocate in the cause of freedom,—
 thus expressing himself rather in dispraise of these humane
 provisions; which to us, who are habituated to them, as the
 ordinary course of process, seem to be indispensable to a fair
 and equitable trial.

• ANOTHER topic, on which also it is not uncommon to hear
 encomiums passed at our own expence, is the greater huma-
 nity of the English practice, which requires the unanimity
 of the Twelve Jurors in their verdict. But, (to pass over all
 inquiries concerning the substance of this rule); if the jury
 must be unanimous in their voice, they are however warrant-
 ed to convict, and even in capital cases are in the use of do-
 ing so, upon the testimony, if positive and explicit, of a single
 witness: A sort of proof, how reputable soever the witness,
 which no Scots Jury can lawfully pay regard to, in any the
 most inconsiderable case. Add to this, that the prisoner in
 Scotland has the same aid of Court, as the prosecutor, for
 compelling his witnesses to appear. Likewise, every witness
 that is produced against the prisoner, has right to see his de-
 claration

claration cancelled before deposing on the trial; so as he may be at absolute freedom in giving his evidence upon oath. The witnesses too are examined out of the presence of each other, which obviates any risk of a combination against the prisoner; and after being examined and dismissed, no witness can again be called on, to explain what he has said, nor to supply omissions: Things, (as I understand it), all or most of them quite foreign to the English form of process, where the opposite practices are established, and are even thought to be essential, (and possibly they are so as matters are managed with them), to the execution of criminal justice. Notice may also be taken of the jealousy which actuates our custom, of all intercourse between the Judge and jury. In so much that the verdict, once delivered into Court, cannot on any pretence be retracted, nor even amended or explained, but must be received and taken with all its imperfections, how glaring soever, on its head. An English jury, on the contrary, are conversed with, reinclosed, questioned and instructed by the Court, without any manner of restraint.

In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised; it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom. "It is impossible" (says Foster) "in a state of imperfection to keep clear of all inconveniences; though wisdom will always direct us to the course which is subject to the fewest and the least, and this is the utmost that human wisdom can

“can do.” Now I think it is impossible, that any person of candour, who will attend to our course of trial from the outset to the close, shall seriously believe that the prisoner has not all humane attention shown to his condition, and all due provision made for his just defence.

THESE observations respect the comparison of our Criminal Law with that of England, in the important matter of the form of trial; and as far as concerns the security of innocence, I see no reason to think, that there is any disadvantage on our side.

I THINK it may also be doubted, whether the complaint is better founded respecting that part of our system, which lodges the power of prosecution with a public officer, the Lord Advocate; by whom it is exercised according to his own judgment and discretion. For what are the evils, which have been found in practice to attend this plan of accusation? Or is it not rather certain, that to this very course of proceeding, which places the entire responsibility for all prosecutions with one individual of high rank and reputation, (who therefore, on his own account, will be cautious and reserved in the exercise of his powers), we owe the singular and constant moderation, which has prevailed, time out of mind, in the administration of this part of public justice. Certainly, it cannot be disputed, that by this contrivance, the prosecutor is most effectually removed from the contagion of that popular prejudice, either for or against the accused, which is apt to arise in any case of an extraordinary or interesting nature. And with respect to the risk of the influence of the Crown; it is true, that in an arbitrary government, where the whole frame and order of things

tends to make the favour of the Sovereign the chief object of regard, and the sole means of preferment, such an institution might be made an engine of injustice. But there is no inference from thence to the situation of things in this country; where such is the care of freedom, the love of justice, and such the high influence of the popular part of the constitution, that any person holding the office of Lord Advocate who should strain his powers, or pervert them to oppressive purposes, would injure alike his own reputation and fortune, and the service of the Crown. And as, on the one hand, the inhabitants of Scotland have nothing to fear, and in truth have never suffered, (since the Revolution at least), from the privileges of this office; so, on the other it is impossible to deny the high and extensive benefits which attend it, in maintaining the police of the country, and securing the prosecution of every criminal whose case requires it, without any trouble, or a shilling even of expence, to the party injured. In that respect the rule of the English system, which in ordinary cases commits the prosecution only to that party, and lays on him the whole care and expence of obtaining a conviction, seems at least, (and, if I have not been misinformed *, this is felt and complained of in their practice), to be less advantageously contrived for repressing the growth of crimes.

IN

* Since writing these remarks, I have seen a *Treatise on the Police of the Metropolis*, (written by an author who has the best opportunities of observing the operation of the English system of prosecution), which makes a heavy, and seemingly well grounded complaint, of the great obstacles to the execution of justice which arise from that source. See Chap. X.

IN regard to another important point, the determining of the proper punishment of a crime when proved. I know some have imagined that the law of England, which fixes the matter by the precise letter of a statute, is preferable to ours, which in a great number of instances leaves it to the discretion of the Judge. Yet it is to this part of our system, that we are perhaps chiefly indebted for the gentleness of our punishments; which, compared with those used for the same offences by other nations, is, generally speaking, most eminent; but which, nevertheless, we have hitherto found sufficient to maintain a greater degree of good order and peace, than exists in any other country so far advanced as this in the arts and refinements of life, and consequently so much exposed to the vices which attend them.

THAT our law is more rigorous than that of England in regard to certain articles, where, unhappily, there has of late been so much occasion to compare the two; this I feel as little inclination as power to dispute. Our ancient statutes animadverted with severity on those offences, which the factious and unruly temper of the inhabitants of this country made it indispensable to repress. And although it might have been expected, that in so long a period of increasing prosperity, and of mild and equitable government, as has elapsed since the latest of these laws, this vice of our disposition might in some measure have been corrected; yet have we, in the events of our own day, seen too much reason to commend in this particular the wisdom of our Legislature, and to be thankful for the powers which they have bestowed upon our Courts.

BUT

BUT explain this instance any way, it never will decide the question as to the general temper of our law; of which if any one wishes to form a just opinion, let him attend to the inconsiderable number of lives which fall a forfeit to its rules. I am certain that I am within the truth, when I mention, that on an average of thirty years preceding the year 1797, the executions for all Scotland have not exceeded six in a year. For a period of fifteen years, preceding the 1st May 1782, the number of persons who suffered death at Edinburgh, (where by far the greater number of capital trials take place), amounted only to twenty-three; that is, in every two years only three persons suffered death. And as to the inferior punishments, I have it from good authority, that one quarter-sessions, for the single town of Manchester, have sent more felons to the plantations, than all the Scots Judges do for ordinary in a twelvemonth. Near thirty years ago, when Judge Blackstone first published his Commentaries, that author remarked, and expressed his regret, that there were then no fewer than one hundred and sixty offences, which had been declared by act of Parliament to be felonies without benefit of clergy. At the largest allowance, and taking in all that are provided for at common law, as well as by statute, (of which last a great proportion have long been completely obsolete), our list of capital crimes does not amount to more than a fourth part of that number. Such is the law, which, by ill informed persons, is reproached as sanguinary and tyrannical in comparison of others; and such the means, by which upwards of a million and a half of people are secured in the enjoyment of all the benefits of the most improved society.

Vol. iv. p. 18.

I REPEAT it therefore, without fear of contradiction, that generally speaking, and with a view to the ordinary course of vulgar practice, (for by this the question must be decided), our custom of punishment is eminently gentle; and would be ill exchanged, for the offenders at least, and indeed I think for the country at large, against a numerous list of special and statutory rules. For plain it is, that if ever we come to establish any such positive code, the punishments must needs be stated high; because the Judge could in no case go beyond them, and not only the young but the more experienced offender must be corrected. Whereas, by our custom, as it now is, that object is fully accomplished; and strict regard is at the same paid, (which, wherever it is practicable, is surely desirable), to the peculiar and equitable circumstances of each case, as it occurs. Take for instance the crime of theft. If a statute were now to be passed, fixing the pains of the several degrees of that offence; is it to be doubted that the stealing of a horse, or an ox, or of goods to the value of L. 10, or even of L. 5, must be rated in the scale as a capital crime; and the Judge be necessitated to pass sentence of death upon every one who shall be convicted to that extent. But, owing to the discretion which in this respect has been reposed with our Judges; how frequently does it happen, that, by reason of youth, or weakness of intellect, or because instigated by some old transgressor, or for other the like favourable circumstance in the case, offenders of this degree escape with some inferior correction? Thus, though at first sight it may seem paradoxical to allege, that there is any advantage in having the punishment of crimes discretionary; yet certain it is, that the operation of this state of things, in our practice, has not been against the pannel, but highly in his favour.

AND

AND here, let me observe, that to this very excellence, (so much extolled), of the definite pains of all crimes in England, is owing the infinite number of pardons, and commutations of punishment, which are there found indispensable to the administration of criminal justice; and which, compared with those that occur in our practice, are in the proportion of at least ten to one. A difference, which, considered in any point of view, and especially with respect to its influence in the important article of the prevention of crimes, certainly will not be thought to be to our disadvantage.

ANOTHER point in which the custom of the two countries remarkably differs, is with respect to the punishment of new crimes or modes of transgression. It seems to be held in England, that no Court has power to take cognisance of any new offence, although highly pernicious, and approaching very nearly to others which have been prohibited, until some statute has declared it to be a crime, and assigned a punishment. With us the maxim is directly the reverse; that the Supreme Criminal Court have an inherent power as such, competently to punish, (with the exception of life and limb), every act which is obviously of a criminal nature; though it be such which in time past has never been the subject of prosecution. And certainly this course is at least attended with two advantages. To the public it is thus far beneficial, that the evil is repressed in its beginnings, and more effectually than it ever can be by any statute: Because all statutes are liable to be partial and defective in their description of new offences¹, and

¹ This is particularly exemplified in England, in the long train of statutes which have been found necessary to be passed with respect to the theft of certain commodities, and the receiving of stolen goods.

and thus the transgressor finds the means of eluding the sanction; and the law itself falls into contempt. But it is also a merciful course to the offender; because the crime being censured on its first appearance, and before it has become flagrant or alarming to the community, is restrained at that season by far milder correctives, than are afterwards necessary to be applied to it, when the growing evil has come to require the passing of an express law in that behalf. Thus in England, the sending of incendiary or threatening letters is punished with death, in virtue of certain statutes, which passed at a time when this sort of wickedness prevailed. But our Judges punished the first offender of this sort, (whose trial was within these fifty years), with transportation; and it has never been found necessary to seek authority for any higher or more rigorous judgment. The same is true with respect to the corruption or alteration of bills, promissory-notes and the like, to the prejudice of the acceptor; which by certain statutes is felony without benefit of clergy in England, and is punishable with us at common law, with transportation. Many other examples might be given. In short, if things are to be judged of upon the testimony of experience, and not according to the fallacious conjectures of human wisdom before the event; the inhabitants of Scotland have no reason to envy the condition, with respect to the administration of Criminal Justice, of any other part of Europe.

WHILE I express myself in these terms, let me not be thought to intend passing a censure on the practice of England, as impolitic or cruel, in rearing up so great a mass of penal statutes upon special transgressions. I have no doubt that their practice is good, and I will presume of the wisdom

of their Legislature that it is necessary, in their state of wealth, society, and manners. I only mean to say, that ours is in all probability at least as well adapted to our own situation in those respects.

LET me add, that while I thus disclaim that superstitious admiration of the English Law, which prevails among some persons, and especially, like other superstitions, among the ignorant; and which would set up that system as a standard of perfection, after the likeness whereof we are to reform and new-model our own; yet on a proper occasion, and for a proper purpose, I have been ready to avail myself of the important assistance which its doctrines may often afford me. I have already said, that as a great body of written and practical reason, and recommended by the example of a free and enlightened people, it has every where, and certainly in our country more than elsewhere, (because the form of our Government, and the general spirit of our jurisprudence are the same with that of England), a strong claim to deference and regard. In matters, therefore, which depend on the common feelings of equity and right, and are not determined otherwise by our municipal custom, nor are anywise involved in it, I have made liberal use of the sentiments, and sometimes even of the words of the English writers on law: An obligation, which, as their works cannot properly be quoted as authorities in a book of Scots Law, I beg leave in this place, once for all, to acknowledge.

HAVING said thus much of my motives towards the composition of this work, I shall subjoin a few words concerning the plan and object of the work itself, and the sources whence I have drawn the doctrine which it contains.

IN

IN regard to the first, a very short and simple account may be given: I mean to open up to the young lawyer the Elements of our Criminal Practice; and to lay before him such authorities and materials, as may serve to guide him in his future researches, and are not to be found in any of our printed works. This, undoubtedly, and nothing higher, is the main bent and scope of my undertaking. I have no intention of bringing forward a Philosophical treatise of Criminal Jurisprudence, in which the history of the human species, with respect to this branch of the science of law, is to be traced; and an attempt made to ascertain, on abstract and universal principles, the nature of the several offences, and the application and proportion of punishments. Certainly these are amusing and interesting disquisitions; but they do not lie within his province, whose attention has chiefly been turned to the investigation of one peculiar system.

NEITHER have I any intention of turning censor on our practice; and of suggesting changes and reformatations, which might fit it to some standard of higher perfection than our forefathers had in view. For this is a very delicate task indeed; and which those only, from whom their scholastic vanity and gross ignorance of the real business of life conceals its difficulty, will be forward to engage in. Nevertheless, when any thing in our system is confessedly inconvenient or defective, (and in what system are not such things to be found), I should conceive it improper for me to abstain from pointing out that circumstance to attention. But in taking notice of it, I shall observe that moderation and diffidence, which every person not abounding in self-conceit, and who has lived to a certain age, and attained to some experience, must feel with regard to any opi-

nion of his own, when opposed to that of our forefathers, and to the practice in time past of the Judges of the land. Still less shall I think it reasonable, where the occasion offers, to omit calling the reader's attention to the peculiar advantages, by which not a few parts of our Criminal system are distinguished. For it is truly doing him a service, to make him sensible of the many blessings he enjoys under the subsisting laws of his country.

BUT although, in the composition of these sheets, I have chiefly had in view the instruction of the lawyer; yet is not this sort of knowledge entirely without its use even to the individual, who has to govern his life and conduct in conformity to the precepts which they explain. It cannot but be interesting to him as a man, to be acquainted with that system of rules and ordinances, according to which, as a citizen of Scotland, he is to answer for his actions to his fellow subjects, and to his Sovereign; and by which the trial of his highest and dearest concerns, his state and condition in society, his freedom, and even his life, must be conducted and decided. Certainly, he will have the better chance to prove a good and useful member of the community, and to demean himself well in all circumstances, and towards all persons, if he knows what the law has in every case ordered; and sees the connection which the respective rights and duties of the different orders of men have, with the maintenance of that state of society, and that form of Government, under which he lives. Sir Michael Foster¹ hath truly said on this head, "The learning touching these subjects is matter of great and universal concernment. It merits, for
" reasons

¹ Preface to his Discourses on the Crown Law.

“ reasons too obvious to be enlarged on, the attention of
 “ every man living. For no rank, no elevation in life, and
 “ let me add, no conduct, how circumspect soever, ought to
 “ tempt a reasonable man to conclude, that these inquiries
 “ do not, nor possibly can concern him. A moment’s cool
 “ reflection on the utter instability of human affairs, and the
 “ numberless unforeseen events which a day may bring forth,
 “ will be sufficient to guard any man, conscious of his own
 “ infirmities, against a delusion of this kind.”

IN regard to the sources from which my information has been drawn. I shall begin with a word or two respecting the Law of Rome; which some may think deserving of notice, not only as being the law of a great and civilized people, but even as having pretensions to some sort of authority in our Courts. But it seems to be the better opinion, (and such are the sentiments of Sir Thomas Craig, and of Lord Stair¹), that even in the civil department, the Roman Law never attained to a binding authority, like that of our own customs or statutes; nor came to be in any other sense our law, than as it was long ago, in particular matters, made a rule of judgment, and thus incorporated into our common law by the decisions of our Courts; or farther than it is agreeable

¹ “ *Nos tamen, in hoc qualicumque regno, Romanorum legibus ita obligamur, quatenus legibus nature, et recte rationi congruunt.*” Craig de Feudis, lib. 1. Dig. 2. No. 14.

“ Our customs, as they have arisen mainly from equity, so they are also from the civil, canon, and feudal laws, from which the terms, tenors and forms of them are much borrowed; and therefore, these (especially the civil law), have weight with us, namely, in cases where a custom is not yet formed. But none of these have with us the authority of law, and therefore, are only received according to their equity and expediency, *secundum bonum et æquum.*” Stair, b. 1. tit. 1. No. 16.

agreeable to equity and reason, or suitable to our situation, and analogous to the rest of our system. If this be true of the civil department, much more must it be so of the criminal. Indeed, if there were even nothing more in the case but this, that our whole judicial establishments, and modes of trial, are utterly remote from any thing that was known among the Romans; this, of itself, is such a difference, as at once sets up an insurmountable bar to the authority of the Roman code. For nothing is more certain, than that these arrangements have a powerful influence on the rules themselves of criminal justice, and the mode of arguing in criminal matters.

INDEPENDENTLY of this, the truth seems to be, that there are in every case very great obstacles to the transferring of the Criminal Law of any one nation to another. Because in any country, the frame and character of this part of its laws, has always a much closer dependence upon the peculiar circumstances of the people, than the detail of its customs and regulations in most of the ordinary affairs of civil life. The rules of decision respecting contracts and obligations, which make a great branch of civil business, must, in all countries that are tolerably civilized, be governed in the main by principles of a general and independent nature; by the common feelings of right and wrong, which are not liable to be very much affected by the state of the Government of the country, or of its political institutions. It cannot be a matter of any concern to the State, or the administrators of public affairs, by what rule the justice of a claim of debt, or the right flowing from any sort of common contract, shall be tried: They have nothing to do in such affairs; nor can any rules be laid down respecting them, of which

which it can before hand be said, how they are to operate in those matters where the State may eventually come to have an interest. But it is quite otherwise as to the law respecting crimes ; which has a near relation to the distinctions of rank among the people, the functions of their Magistrates, their institutions and national objects, their religion, their state of Government, and their position with respect to other powers. Now, take the Romans at any period of their history ; there are so few points of resemblance between them and us on any of those matters, that no one can for a moment seriously reflect on it, without perceiving that what was natural, suitable, and convenient in their situation, has not, from that circumstance, any sort of recommendation to us.

THIS is certainly true in regard to the Roman Law during the time of the Republic ; and applies to it almost equally in that more advanced state, in which we are best acquainted with it. It was by no means to be looked for, (and the reasons against it are obvious), that the criminal system should ripen and refine under the Emperors, to the same degree as did the law of civil rights. Nor did it prove so in fact. It was on the contrary here, as might be expected, that the jealousy and violence of every bad Prince, and the short-sighted policy of every weak one, chiefly displayed itself. Hence, in this department, instead of those equitable distinctions and comprehensive views, so eminent in the civil branch, we find a succession of detached and specific, and often inconsistent ordinances ; which were made according to the demands of the time, or the temper of the reigning Prince, and were probably, most of them, no longer observed than while those occasions lasted. Accordingly, although our lawyers have been in the use of resorting

resorting to the Roman code for a confirmation of their arguments in criminal matters; and though of old they even sometimes set it forth in the preamble of indictments as law, (in like manner as they did the Canon and Jewish laws); yet I cannot find that the Imperial constitutions ever were incorporated into the municipal system, or held to possess an authority, farther than as some of them occasionally express a reasonable sentiment, with a brevity and an elegance which are fit to recommend it. For these reasons, though I have not neglected the authorities of the Roman system, in cases where I find that they have actually been regarded in our municipal practice; yet I have not otherwise engaged in frequent or very extensive discussions with respect to them.

If I have thus paid but little regard to the compilations of Justinian; still less have I thought it material to detain the reader on every occasion, with a scrutiny into the sentiments of the numerous commentators on them in modern times. Not that I mean to speak of their works as useless or nugatory in themselves; but that it were very absurd to look into any of them for an exhibition of the practice of Scotland, which those foreign authors could know nothing about. And as to the discussions which they sometimes enter into of more general topics, such as the nature of the several crimes, the competency of the several defences and the like; though many of their observations are just and rational, yet for the most part they teach nothing more than any man of plain sense, with a little attention to the subject, will readily, and to as good purpose, make out for himself. As Sir George Mackenzie has observed with respect

respect to the quotation of authorities¹, " he darkens his own cause, when just, who uses these to ignorant people ; " and he lessens his own esteem, who thinks he needs them " among men of better sense. Besides, if in such matters we are to resort to authority, for confirmation of what equity and reason dictate, the works of the English lawyers are here entitled to the preference. Both by reason of the nearer analogy of the English practice to our own ; and because the general principles upon which a question turns are laid down by those authors, and the doctrine illustrated with a precision of language, and soundness of head, not inferior to what appears in the works of any lawyer or commentator of other countries.

THE main store from which I have drawn the materials of this treatise, is therefore the books of adjournal (or records of the Court of Justiciary), containing the pleadings of the Bar and the judgments of Court ; and which extend, (though with several interruptions in the sixteenth century, and one of six years² in the seventeenth), from November 1524, down to the present time. I have gone over the whole with attention, (in which I have had the assistance of a gentleman particularly skilled in the decyphering of ancient manuscripts³) : and though I am far from doubting that very many things, both curious and important, still remain buried there, to reward the industry of any one after me who shall engage in the like research ; yet I flatter myself that

¹ Works of Sir George Mackenzie, vol. ii. p. 353.

² This is from 1655 to 1661.

³ Mr William Anderson, writer in Edinburgh.

that I have also brought some things to light, which at least were not universally known. There is, in the Advocates Library, a manuscript abridgment of the records of Justiciary; and of this I have also made use, (but never without marking it as my authority), for those periods of which the original records have perished; for this abridgment must have been made at a time when the books of adjournment were more complete than they are now. These memorials of our custom, along with Lord Royston's Manuscript Notes upon Mackenzie, which contain many judicious remarks and much valuable information, have been the main ground-work of this undertaking. In themselves they are the surest of any; and in order that the reader may be enabled to judge for himself, how far they support me in my conclusions, I have, in every instance where it seemed material or useful, laid the passages themselves of the record under his eye, in the form of notes, along with the doctrine of which they are the vouchers and confirmations. It would be rash to suppose, that in the course of so long a work some inaccuracies in point of date or quotation may not have crept in: but as I have not spared pains on this head, (being very sensible that the value of any performance of this kind depends entirely on its accuracy); so I hope that they shall not be found numerous, nor of much importance.

LAST of all, in regard to the order I have followed in treating of the subject: this is truly a point of less importance in explaining the system of Criminal than of Civil Jurisprudence. Frequently the doctrine of one species of civil right cannot be understood, till that which concerns another has been fully explained; and thus there is an order of inquiry pointed out as the best, by the very nature of the thing. But the law respecting one sort of crime

crime scarcely ever stands in such a relation to that which regards another ; so that it is often an almost arbitrary matter, to what subject the student shall first direct his attention. I have chosen, therefore, to take up the several crimes in the order rather of their frequency and practical importance, than of their rank in other respects. Thus I begin with those offences which are committed against individuals, and among these with the offences against property ; after which follow the several modes of injuring an individual in his person or his fame. Having exhausted these, I proceed to such offences as more immediately concern the public ; which, after the example of Judge Blackstone, I have distributed into several classes : as they are hostile to the course of public justice ; to the public peace ; to the police and public oeconomy of the kingdom ; or to its interest in point of trade. The next division includes the high crimes of treason, sedition, and some others which are levelled directly against the Sovereign and the State. And the last consists of those transgressions which relate to God and to religion.

THE title of my present publication, does not embrace any thing that has relation to the *trial* of crimes, or the *execution* of criminal justice. Before proceeding to these, which are not the least arduous part of such an undertaking, I have thought it better to consult the judgment of the Public, with respect to the manner in which I have treated that portion of the subject which is now laid before them. At the same time, if I should never find leisure to absolve this labour ; what is now published forms a whole by itself, which is independent of the other part, and in every place intelligible without any knowledge of what relates to the form of trial.

NOTA

NOTA BENE.

IN citing cases in the Records of Justiciary, I have, for the most part, marked the precise date or dates of the particular proceeding or proceedings which are mentioned in the text. In those instances where the reference in the text is of a more general nature; the reader is to understand that the date marked, is that on which the libel in the case cited stands entered in the record. When possessed of this, he has it always in his power, by attending to the several interlocutors, and adjournments of diet, to trace the case onwards, in the record, down to its final issue. In vol. i. p. 6. the case of Niven is erroneously marked as tried in March 1796, instead of December 1795. In the same volume, on the margin of p. 250. and in the date of the proceedings against Thomas Hall, the year, viz. 1789, is wanting. On the margin of p. 209. of the same volume, by an error of the press, 1787 is printed instead of 1597.

In citing the Scots acts of Parliament, I have used the ordinary edition, (of which the two first parts by Murray of Glendook), in three small volumes. I have used the folio edition of Sir George Mackenzie's Treatise concerning Matters Criminal, printed in 1699.

In regard to English books of law: I have used the first edition of Blackstone's Commentaries, in four volumes quarto; the folio edition of 1739, of Hawkins Pleas of the Crown; and the folio edition of Sir Matthew Hale's Pleas of the Crown, printed in 1736.

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COMMENTARIES
ON THE
LAW OF SCOTLAND,
RESPECTING THE
DESCRIPTION AND PUNISHMENT
OF
CRIMES.

CHAPTER I.

OF THE NATURE OF CRIMES.

IN determining the extent of that part of the law which has relation to CRIMES, I shall be guided by the ordinary acceptation of that term, and shall consider every act as a crime, for which the law of Scotland has appointed the offender to make satisfaction to the public, beside repairing, where that can be done, the injury which the individual hath sustained. It is obvious, (and I do not think it necessary to say more concerning the nature of crimes, as contradistinguished to civil wrongs), that in exacting any such atonement of him, the Legislature always proceed on the opinion of an infringement on his part of that social regard,

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gard, which, as a citizen, he owes to the community ; whether it be that he has violated their security, or their tranquillity, or has trespassed with respect to some of those other articles of wholesome government and regulation, which affect the public polity and general welfare of the realm.

Neither, before I enter into the detail of the several offences, shall I occupy the reader with any inquiry concerning the source of the right of inflicting punishment, an inquiry which would only be proper, (if it could then take place), in the very beginnings of society and legislation ; nor with an attempt to trace the natural history of crimes, and of the establishments for correcting them, through the different periods of the social state. For, though a research of this sort would be a proper and most interesting article in a history of jurisprudence, a noble department certainly of knowledge, and fit to employ an ingenious mind ; yet it does not fall within the compass of his undertaking, who only professes to give a commentary on the special laws of his own country, as they actually stand. Besides, if such an essay were even in its proper place in a work upon this plan, it would be reason sufficient against engaging in it, that the task has already been performed by the hand of a great master in this line, (Lord Kames, in his *Treatise of Criminal Law*), whose remarks if I were not to repeat, it could be only out of the weak desire of avoiding the path which he has pointed out to me, and not from any hope of guiding the student into a better.

If I avoid disquisitions of this sort, which, if not very useful in the daily practice of courts, might, however, be curious and amusing, and certainly would not be attended with any danger of doing harm, still less shall I think it any part of my duty, to enlarge at this time in observations on
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the due measure, proportion, or application of punishments, or on the style, the objects, and proper qualities, of penal laws, which are rather the business of the political philosopher, than of the lawyer, and on which subjects, let me say, much hath been rashly written, in a loose and general way, by authors but moderately skilled in the business of life, and very unequal to the arduous task of improving the science of legislation. I will say farther, that I am deterred from hazarding any assemblage of precepts towards those objects, when I consider that even under the pen of able and judicious authors, such as Sir William Blackstone, (and certainly I cannot mention a stronger instance), these general and prefatory articles have produced so little, which is not either so trite and obvious, as scarcely to require being taught, or else, is, in its application to particulars, so liable to modification and exception, from exigencies of situation, or for other special reasons, that truly we almost lose the rule, in the attempt to turn it to any service. I judge it therefore more useful, as well as safer, that any remarks of this character should be introduced occasionally in the progress of the work, and with reference to particulars which suggest them; in which course, the true meaning and just limits of those maxims may more clearly be perceived, as well as their truth or falsehood be more thoroughly tried, than if they were only delivered in the abstract.

DECLINING, therefore, to make any excursion into these regions, I shall begin, as a necessary introduction to the analysis of the several offences, with an explanation of the nature of that dole, that malicious and wilful purpose, which, according to all authorities, herein conformable to nature and reason, is essential to the guilt of any crime. But in deliver-
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vering this general precept, those authorities are not to be understood in that special and restrained sense, wherein the term has often been taken and pleaded in criminal cases; as if it were always necessary for the prosecutor, to bring evidence of an intent to do the very thing which has been done, and to do it out of enmity to the individual who has been injured. In this very favourable sense to the pannel, the maxim cannot be received into the law; for it would tend to screen many great offenders from punishment of their transgressions. And I think it is only true in this looser and more general, but practical and reasonable sense, in which an English author¹ of the first judgment in those matters, has explained it; that the act must be attended with such circumstances, as indicate the corrupt and malignant disposition of the offender, the heart contemptuous of order, and regardless of social duty.

In the first place, it is not necessary for the prosecutor, to bring evidence of a special purpose to injure the very person who has been the sufferer on the occasion. In a trial, for instance, for the crime of fire-raising, it will not affect the judgment of the Court, nor ought it of the Jury, that the house which has been consumed is not the house of his enemy, which the pannel meant to destroy, and to which he applied the fire, but that of another person, to him unknown, and to which, by the shifting of the wind, or other accident, the flames have been carried. The same is even true in the case of homicide, that crime to which a special malice might seem more natural and proper than any other. For if John make a thrust at James, meaning to kill him, and George, throwing himself between, receive the thrust, and die, who doubts that John shall equally answer it, as if his

¹ See Foster's Crown Law, p. 256. *et seq.*

his mortal purpose had taken place upon James? Or if John lay poison in such circumstances, as shew it to be intended for a human creature, he shall certainly die for it, though it be accidentally taken by the person who is dearest to him upon earth, and whom, at the peril of his own life, he would have redeemed from such a hazard. This was the opinion of the Court, and never was doubted to be sound law, in the case of Carnegie of Finhaven, who, hastily thrusting at Lyon of Bridgeton, who had insulted him, happened to kill another person, the Earl of Strathmore, to whom he bore all manner of regard. And the same in some measure was the description of the case of Matthew Hay, tried and convicted of murder, at Ayr, in May 1780. The intention of this man was to poison a young woman, who was with child to him. She, however, though she ate of the food in which the poison was mingled, survived the attempt, though injured in her health; but her father and mother, who also ate of it, were destroyed. Certainly the case was thus far more unfavourable to him, that he could not but see the plain hazard to those who actually died, having thrown the poison into the vessel, where the common mess was cooking for the family.

July and
August 1728.

In the next place, it is not even indispensable, that the malice be directed against any one in particular. For if a man wickedly fire among a multitude at random, or if he maliciously turn out a mad dog into the street, at a time when it is full of passengers, and a person is killed in consequence of this brutality; surely any difference between such a case of indiscriminate malice, and one of special hatred to an individual, is all to the disadvantage of the offender, who cannot be considered any otherwise than as a monster, or enemy

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enemy of the human race, that ought not to be suffered among men. A charge of this sort was brought against James Niven, in March 1796, of whom the libel related, that having loaded a small cannon with powder, and a bit of iron, and having pointed it up a lane or street of common passage, he there fired it off, at a time when two persons were standing in the direction of the piece, and others were passing along the lane; whereby one of the persons first mentioned was killed. The circumstances of the case gave no reason to presume, that the pannel was actuated by special enmity to any of these persons, who were all unknown to him: Yet it was held upon the Bench, *that if the charge were proved, as laid*, he was guilty of no lower crime than murder. The Jury found a verdict in his favour.

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NEITHER is it always necessary to conviction, though it is the ordinary and more frequent case, that there be evidence of a fixed intention on the part of the pannel, to do the sort of mischief which in the event has happened. If indeed the thing happen accidentally, and in the prosecution also of some different and lawful act, from which the pannel cannot reasonably have any dread of the harm that ensues, this is exclusive of the notion of guilt: There is no *malus animus*, no vice or corruption of purpose, to fix an evil character on the deed. But if, on the contrary, the circumstances indicate a wicked and malignant spirit, a resolution to do some violent and atrocious mischief, though it go to a greater length than the pannel is absolutely bent upon, or take a course somewhat different from that which he intends, it is clear, that in many cases it will be all one, as if he foresaw and intended the actual issue. If a man lie in wait for his neighbour, with intent
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to do him some grievous bodily harm, as for instance to hamstring him, to cut out his tongue, or to give him an outrageous beating, or the like, and the person is so abused that he dies, either on the spot, or afterwards of the consequences of the injury, the law knows no difference between this and the dole of murder. He hath actually killed, and cannot be said not to have willed it, having willed that which put his neighbour in plain hazard of his life, and which shewed an utter indifference about the fate of his neighbour, whether he were to live or die. Or again, if one set fire to his neighbour's corn in the barn-yard, meaning to burn the corn, but the fire spreading catches the adjoining dwelling-house, which is also consumed, and the inhabitants within it, this is a clear ground, on which the author of the calamity may as well be indicted for murder, as for fire-raising.

IN these instances, the actual issue participates of the nature of the original purpose, and the general malice is followed by a mischief of that sort, which is naturally referrible to that same disposition and temper of mind in the offender. But what shall be said, where the will to do a certain unlawful act is accidentally followed by a mischief, which is of a quite different kind and degree? In cases of this sort, according to certain of the English authorities, the guilt of the first purpose is to be considered, and the man to have judgment according to the character in law of that which he intended to do: So that if a person, shooting at a bird, happen unfortunately to kill his neighbour, his sentence shall be different, according to the kind of bird, and his purpose in shooting¹. If it be

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¹ Foster, p. 258, 9. Keyling, 117.

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a tame fowl, which he shot at for amusement only, or for his improvement as a marksman, it shall be manslaughter, because of the unlawful purpose, of trespass on the property of another. But if he shot with intention to steal and carry off the fowl, which is a felony, it will be murder, by reason of that intent: And again, if the homicide happen in shooting at a wild pigeon, which is *nullius in bonis*, the person shall be entirely excused. But I have found nothing in our records, which inclines me to believe that our practice would be disposed to take up a strained and artificial principle such as this, by which things, in their own nature repugnant, are conjoined, and the crime made out by coupling a purpose of lucre, to an act which is only then criminal, when it comes of malice and a purpose to destroy; a disposition which has neither actually been exerted, nor can reasonably be inferred against the pannel, as one who might probably be capable of such wickedness, if the occasion should happen.

If indeed the accident which ensues is a near consequence and natural concomitant of the crime, which was meant to be committed, this will alter the case. As thus: If a person goes out armed, to rob on the highway, and he attacks a passenger, who resists, and in the struggle his pistol discharges, and the passenger is killed, this, without a doubt, is murder. For not only is slaughter a near and probable result of the purpose of violently robbing, (in so much, that if the party should fall in the struggle, and break his neck, even this might well be argued to be murder); but it happens in this instance, in consequence of a preparation made to kill; so that there is here an original malice and mischievous purpose against the person, suitable to the event, and

and whereof all the hazards must be with him, who has acted on so atrocious a principle.

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The like decision may seem to be right in another situation, of which one instance was brought before the Court of Justiciary, though the prosecutor avoided to press it to a judgment; as indeed it is a case of more difficulty than any of those which have yet been put. I allude to the case of a person who sets fire to his own house, being insured, and inhabited by himself, meaning thereby to defraud the insurers; if, in the progress of the flames, the house of his neighbour also is destroyed. For though the main purpose is a purpose of lucre to himself, yet neither can he in any proper sense be said to be free of malice to his neighbour, of whose plain danger, from the conflagration thus kindled, he has shewn his extreme disregard. And indeed, if the case be put somewhat more unfavourably for the panel, as upon the supposition that the two houses are under one roof, or are floors of the same tenement, or are otherwise so connected in the way of building, that the one must be in very great risk by the burning of the other, there seems to be little doubt of the decision which shall be given.

Jan. 13. 1792.
John Ker.

I will, by way of illustration, put another case. If a mob break into a house, meaning to destroy and pull it to pieces, and in the bustle they accidentally set fire to the house, which is consumed, there seems to be no good reason why this may not be charged as fire-raising. Because the same revengeful disposition is exerted, and the same injurious object is gained, in either mode of mischief; and thus the first purpose is easily carried over to the event, without any sort of doubtful or unwarrantable inference against the panels.

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But

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But if a thief breaks into a warehouse by night, to steal, and is scared with noise, and hastily retires, leaving his light behind him, and thus the warehouse is burned, there is no ground of inference from the motive of the thief, which was for pure profit, without consideration of the person injured, who or what he was, to that harmful and vindictive purpose, which is essential to the crime of fire-raising. At most, therefore, the pannel, in such a case, could only be liable to an arbitrary pain, as having done his neighbour this great harm, in pursuance of an inchoated criminal act. But I will not insist any farther in this inquiry: Especially as I have little aid therein from the state of practice, which does not afford any adjudged case towards elucidation of these rare and difficult questions; so that I have only been stating my own sentiments, concerning that which seems just and reasonable in itself.

Of the Nature
of Dole.

THOUGH upon these articles there be great room for difference of opinion, yet the practice of all countries is agreed with respect to certain others, which also concern the state of the offender's conscience. It is not material to the notion of guilt, (and indeed if there were no other reason for it, the impossibility of searching into the heart and secret thoughts would be a sufficient one,) that the offender have himself had the full knowledge of the wrong and wickedness of the thing he did. Though he were persuaded that it was innocent, or even meritorious, (as we know that by fanaticism both in politics and in religion, men of worth and ability have been moved to commit the foulest crimes,) yet still it will not save him from the judgment of the law, which must be determined by the nature of the act, and its evil consequences to the public, and not by any regard to those

those miserable and strange delusions, which are as dangerous as the vices of the most open malefactor. Whatsoever be the cause which impels a person to the doing of those things, which are destructive of the interest or the bonds of society, his will is not on that account the less vicious, or his nature the less depraved. It is only the greater proof of his depravity, that he could do these things, without even feeling that they were wrong.

As little is it included in the notion of dole, that the offender have been in the knowledge of the punishment which law annexes to his crime. Nay, though he even thought that it was a lawful act, and liable to no punishment, as in the case of plundering a wrecked vessel, or rescuing his own goods seized by the revenue-officers, still he shall not have a defence in this belief; for he may, and is bound to know, as much of the law as relates to the regulation of his own conduct, and shall be judged on the presumption that he does so. And thus it is, that certain cases of homicide and other offences are explained, and reduced under the common principle of dole, in which it may seem, at first sight, that the person is punished for pure error, without a criminal intention. The judge, for instance, who pronounces a sentence of death, which is obviously unlawful, is not adjudged guilty of murder because he has erred, but on the footing of his having wilfully done wrong. The law, which cannot know the truth of his excuse, and which perceives the plain advantage that might be taken of such gross pretences, for the indulgence of malice, presumes his knowledge of that which he is not excusable for being ignorant of, and will judge him accordingly. As applied to this matter, this seems to be the true meaning of that maxim, so often mentioned in the Roman law, *culpa lata equiparatur dolo*.

CHAP. I.

Who may com-
mit Crimes.

AFTER this of the nature of dole, or criminal intention, we naturally pass to an enquiry concerning the persons, who are or are not capable of contracting this sort of guilt. For in truth, as Blackstone hath observed, all the pleas and excuses which serve to protect any one from those pains, which law has otherwise appointed for his offence, may be reduced to the one consideration of the defect, either absolute or in a certain degree, of that dole, that vicious will or depraved disposition, of which we have now been treating.

Case of Minors.

I. WE shall first attend to the case of minors, or persons under age, who are from that cause deficient in intelligence, and in firmness also or maturity of will. As this is not, however, equally true of all minors, but is various according to the several degrees of non-age, and is even very different in persons of the same years, so the law of most countries has qualified its rules on this head, and made more than one distinction.

Law of Rome,
and of England.

How this matter was arranged for the several periods of life by the Roman law, is not any where very expressly or fully delivered; though, upon the several loose and scattered testimonies¹, relative to the different crimes, it rather appears, that even upon a person under the age of fourteen, if *pubertati proximus*, and found to be *doli capax*, some punishment might be inflicted, but lighter than in the case of a minor *pubes*. But in the law of the neighbouring kingdom, the following, not unreasonable rules, seem to be received:

1. With

¹ See Dig. lib. 50. tit. 17. l. 111.; lib. 47. tit. 2. l. 23.; lib. 44. tit. 4. l. 4. No. 26.; lib. 47. tit. 12. l. 3. No. 1.

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1. With respect to persons either male or female, of fourteen years of age, that capacity of dole is to be presumed, and the ordinary judgment to be pronounced upon them, though it be even judgment of death. 2. With respect to those who are under fourteen, and still more decidedly with respect to those who are under twelve years of age, the presumption is the other way, but still not to the exclusion of evidence to the contrary; which, if it be obtained, and be pregnant, and if, instead of delaying judgment, (that the King's pleasure concerning a pardon may be known), the Court chuses to proceed, it shall be judgment for the ordinary pains, whatsoever these are, of the offence. 3. In the case of mere infants, or persons under seven years of age, the presumption of freedom from dole is absolute, and does not allow a conviction to be obtained¹.

TOUCHING our municipal practice; I know not whether it can be affirmed, that it has yet, in all these articles, attained to the same degree of maturity and precision as that of England. This, however, seems to be certain, that with respect to minors, if they have reached the age of puberty, which in this question will be fixed at fourteen for females as well as males, they are liable to the ordinary judgment, not excepting that of death, for those crimes, such as murder, fire-raising, theft, and the like, whereof the wickedness may be known to them, even at that early period of life.

Mackenzie has indeed delivered his own opinion, that a *minor*, (for he uses no other term), shall not in any case be liable to the ordinary pain, not even for crimes against the law of nature, such as murder²: Nay, he even seems to think

Minors, if punishable capital-ly in Scotland.

¹ Hale, vol. i. p. 25. *et seq.*

Blackstone, vol. iv. p. 23, 24.

² Tit. of Crimes, No. 5.

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think it reasonable, though he does not affirm this to be law, that for any crime done in minority, the offender should not be obliged to answer till he be major. But it is obvious, that so wide a scheme of indulgence, which would exempt that season of life when men are most adventurous and inventive, and most liable also to the seduction of evil example, not only would not be salutary, but in the end would prove to be the reverse of merciful or humane. And in truth, though our records afford us many instances of such a plea maintained for a minor pannel, and some of a lighter punishment inflicted on him, after advising with the King or Privy Council¹, (as certainly nonage is always one ground of a claim of mercy, and may have its weight along with others); yet still this lenity never grew into a rule: On the contrary, it was always an extraordinary matter, and whensoever the proper occasion came, the minor convict, equally as any other, underwent the highest severity of the law. Thus, on the 27th July 1636, upon the conviction of Allaster and Callum Forbes, as art and part with Patrick Macgrigor *alias* Gilroy, and others, in their herships and depredations, the Justice, in respect of their minority and their ingenuous confession, supersedes to give doom, until he know the pleasure of the Privy Council. On the 29th July, after consulting with that

¹ Thus, on the 5th April 1636, on the conviction of John Macilconnell, a boy of fifteen, as present with the Macgrigors at their robberies and depredations, the Justice, *at the intercession of the assize*, supersedes doom, until he advise with the Privy Council. According to a marking on the margin of the register, he seems in the end to have been banished. But the manner of the proceeding shews, that the Justice held this lenity to be out of the ordinary course, and beyond his own powers.

that body, he adjudges them to be executed along with their older and more practised associates *.

In like manner, on the 26th August 1612, James Middleton, indicted for slaughter, pleads that he was only fifteen at the time libelled. The pursuer avers that he was then seventeen. The Justice finds process, and on conviction, he has sentence of death *. The trial of William Jameson is a third instance of the same tendency. This pannel was indicted for murder, and the Justice, in respect of a testimonial from the parish of his birth, "beirand the pannell to be past saxtene years of age;" repels his plea of non-age, and sends the charge to an assize. But he had a verdict in his favour. Again, in the case of Robert Forrester, who is pannelled along with his father for forgery, and alleges that he was not more than fourteen years old at the date of the fact libelled, the charge is nevertheless sent to an assize; who

Feb. 16. 1632.

June 21. 1634.

The verdict says, "And as concerning the punishment to be inflicted on Allaster and Callum Forbes, for the forenamed crimes, for the whilk they are convict, in respect of thair confession, remittis thair punishment to the Justice to consider of thair minority."

"The Lords of Secret Council ordainis and commandis his Majestie's Justice, &c. to pronounce doom and sentence against Allaster and Callum Forbes, and Gillespie Macfarlane, quhais dome was continuit be thaim, while they consultit the said Lordis thairanent; ordaining them to be hangit to the death, and for that end to be drawn backwards to the place of execution, the morne, in the afternoon, along with the rest of James Grant and Gilroy's complices."

* He lay six years in goal, and on the 18th November 1618, was allowed to go into banishment.

CHAP. I.

July 4. 1664.

Minors, if punishable capital-ly.

who indeed acquit him, but on a separate ground¹. Farther, this matter underwent a debate in the case of the Viscount of Frendraught, accused of the murder of Gregory of Netherdale, and of imprisoning a free liege; and in that instance also, the issue was, that the defences were repelled, and the case remitted to the knowledge of an assize².

IN later times, the same practice has without hesitation been followed. Thus, on the 14th March 1786, Walter Ross, for pocket-picking; on the 20th June 1786, John Johnston for the same crime; and on the 14th February 1785, Archibald Stewart, for two acts of house-breaking; had all of them sentence of death, being lads of about eighteen years old. Also, on the 23d June 1791, Stewart, Paul and Bannatyne were condemned to die, for robbery; one of whom was not above eighteen. For the like crime, James Mackenzie, at the age of seventeen, had sentence of death at Glasgow, on the 11th April 1793. But a much stronger example than any of these, and indeed such as makes

¹ Robert Forrester alleges, "That the said Robert, the time of the alledgit counterfeiting of the said alledgit testimonial of the subscriptions thereof, was nocht of the age of fourtene years, at least had nocht past that age, and sae was not *doli capax*." The pursuer answers, "That he may be *fraudis capax*, gif he be but twelf years of age, at the least fourtene, being past pupillarity; and the pannell's assertion ought nocht to be respectit, because nocht verifit nor proven; likeas, as the pursuer alledges that he was past seventene years of age the tyme of the writing."

"The Justice repells the alledgiances above written, and nochtwithstanding thereof, refers the dittay to the knowledge of ane assize."

² "Ordains the Viscount of Frendraught to pass to the knowledge of an assize, notwithstanding the defence for the crime of murder, incarcerating and detaining ane free liege, and for art and part of these crimes,"

makes it unnecessary to carry our researches farther, is the case of Samuel Pirrie, post-boy, tried at Ayr, for abstracting a packet from the mail, containing the sum of L. 18, which he conveyed to his mother-in-law, Jean Fitchie, who appears to have seduced him to the crime. The verdict is thus: "Find the pannel Samuel Pirrie guilty of the theft
 " as libelled; but in respect of his tender age, being under,
 " or little above fourteen years, his apparent weakness of
 " understanding, his open and candid confession, and that
 " it appears by the evidence that he committed the crime
 " at the instigation, and for the benefit of his stepmother,
 " Jean Fitchie; they beg leave humbly to recommend him
 " to the royal mercy." Yet even in these circumstances, which are an assemblage of all the considerations which in any case can serve to extenuate guilt, did the Judge¹ think it his duty to pronounce sentence of death upon the pannel, leaving the intercession of the jury to have its due influence upon the royal breast, where it accordingly had the desired effect, of procuring a pardon to this weak and misguided youth.

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Ap. 20. & 21.
1786.

WITH respect again to capital crimes of a statutory and instituted nature, such as hearing of mass, striking in presence of the Court of Session, and the like, it may seem to be more doubtful, whether there be not room for a distinction in favour of those minors, who are nearer the years of puberty than majority. And here an argument may be grounded on the statute 1661, c. 20. concerning the cursing and beating of parents, both in favour of such an indulgence, as a reasonable thing in itself, and for fixing on the age of sixteen years, as that at which the minor shall
 C become

How punishable
for statutory
Crimes.

¹ Then Lord Braxfield, now Lord Justice-Clerk.

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become liable to death, for offences of this description. For so it is appointed by that ordinance, with respect to the transgressions there vindicated, which, though known to every child as high immoralities, and deserving of the most severe domestic correction, yet as objects of public trial, and of sentence of death, are rather the creatures of the law, and cannot justly be imputed to any one, who has not attained to maturity of judgment and discretion.

Pupils, if punishable capitally.

IN regard to persons, whether male or female, under the age of fourteen years, whether they in any case are liable to be capitally punished, I shall rather content myself with stating such testimonies as I have found in the record, which have relation to this matter, than attempt to infer a rule from such scanty and imperfect materials.

On the 21st October 1564, William Elliot of Horsliehill, and five others, are pannelled, for the murder of Scott of Hassinden. One is repledged; four are convicted and beheaded; and with respect to the sixth pannel, Archibald Elliot, who is marked *puer* on the margin of the record, opposite to his name, he is *dismissed*, without trial. On the 6th of August 1605, William Maxwell, indicted along with his father Archibald, for slaughter, and for shooting with hagbuts, is sent to an assize, notwithstanding his plea of pupillarity. The Justice, however, at the same time, "remits to the assize to take cognizance of his age, if they think expedient." The assize find him guilty "of shooting with hagbuts, within a spear's length of his father's house, and that he was then within fourteen years of age." It does not appear that any sentence followed upon this conviction.

Pupils, if punishable capitally.

IN March 1701, Duff and Millar, the first a boy of fourteen years, the other about twelve, are indicted, along with
Frazer

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Frazer and Anderson, two grown men, for breaking into the Earl of Home's house at Hirsel, and stealing a quantity of plate. The libel, as to the two boys, is found only relevant to infer an arbitrary pain, and to infer death against the other pannels. On conviction, Frazer is condemned to die, and Duff and Millar to be scourged at the gibbet, at the time of his execution, and Duff to stand for an hour, with an ear nailed to the gibbet, in presence of Millar. The next in date to this is the noted case in 1749, of Alexander Livingston, a boy of twelve years old, and found by the jury to be *doli capax*, and guilty of killing another boy, by stabbing him with a knife: and here the Court gave judgment of transportation. Last of all, John Brand, a boy of thirteen years and eight months old, was brought to trial at Perth, for stealing letters from the post-office, which he had accomplished by an ingenious device of his own contrivance. The Judges on the circuit thought the case proper for the consideration of all their brethren. But the boy petitioned for banishment, and the prosecutor thought it proper to consent.

Mar. 3. & 19.
1701.

MacLaurin's Cases, No 55.

June 30. 1789.

Such as these precedents are, they are all upon the side of mercy. Yet I shall not affirm that they are such, as to make an absolute rule for all cases of crime committed in pupillarity, without regard to the atrocious wickedness, the incorrigible obstinacy, or malicious cunning, of the offender, fully revealed in that of which he is convicted. Put the case of repeated fire-raising, or of the murder of a parent, or of the murder of any person by poison, committed by a boy of twelve or thirteen years of age: I hesitate to say, for any authority I have seen, that the law will extend its mercy to these situations of extreme and hopeless depravity.

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If, by any future judgment, it shall be found that a pupil has no absolute exemption from this last and highest atonement for his crime, probably this discretion of the Court will, however, at least be subject to a limitation, with respect to that period of life, between seven and ten and a half years, and in the civil law termed *infantia proxima*, which can hardly be supposed to receive the full and capital degree of 'dole. On the 13th November 1493, in a Court held at Lauderdale, Thomas Gothraſton, a boy of eight years old, charged with the murder of John Smith, is ordered to be ſharply ſcourged, "*ad effuſionem ſanguinis*," on a holiday, at the church of the pariſh of Legertwood, within which he had done the deed¹. In the caſe of Maxwell againſt Armſtrongs, for burning of corns, an objection is moved for certain of the pannels, who allege that they were only eight years of age at the time libelled. The reſult ſeems to be, that they are paſſed from on finding caution to keep the peace². In like manner, in the caſe of William and James Hamilton, which is a trial for theft, the proſecutor "paſſes ſimply fra the purſuite of James Hamilton, becauſe he is bot ane "young boy of ten year auld or thereby."

Jan. 11. 1605.

Dec. 10. 1617.

Pupils, if puniſhable arbitrarily.

HITHERTO of the competency of inflicting death. In regard to the leſſer pains, a more certain language may warrantably be uſed. It is not by any authority maintained, that a mere infant, one who is under ſeven years old, is in any caſe liable to any manner of pain. On the other ſide, it is as little to be doubted, that for all crimes of ſuch a kind, whereof the wickedneſs can be ſuppoſed to be known to them, and

¹ See Maclaurin, p. 747.

² I ſay ſeems to be, becauſe the record is confuſed and difficult to be read.

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and committed in circumstances of freedom, (for this seems to be a necessary condition of the rule), all who are above that age, and proved to be capable of dole, are liable to such mitigated pains as shall be adequate, in the opinion of the Court, to the ends of correction and example. In evidence of this, it may be sufficient to refer to two instances, in addition to those which have incidentally been mentioned. One is the case of Charles and Donald Robertson, two boys under fourteen¹, (as was alleged), indicted along with their father, for the casting down of certain houses, at his command, and carrying off the materials to which he pretended right. This charge was, upon full debate, found relevant against them, and remitted to an assize; but a conviction was not obtained. The other is the case of Ludovick More, Andrew Duncan and James Robertson. The charge here was for shop breaking, and Robertson pled, that at the date of the fact, which was nearly a year before the trial, he was a pupil and *doli in capax*, as would be evident to the Court, *ex habitu vultus et corporis*. But of this plea no notice was taken in the interlocutor; and being convicted, he had judgment of transportation along with the other pannels.

Mar. 6, & 9.
1671.Jan. 27, & 28.
1726.

Feb. 3, 1726.

In like manner, upon libel for high crimes raised against either a minor or a pupil, and followed with petition on his part for banishment or other arbitrary pain, it has always been the practice that judgment passes to that effect; nor will the person be reponed against a sentence of this sort, under pretence of his minority, without proof of some gross irregularity or substantial injustice in the proceedings. It has

¹ "As to both the sons, it is particularly pleaded, that they were not fourteen, and so not punishable, and cannot pass to the knowledge of an assize." This is a passage of Sir G. Mackenzie's pleading for them, as in the record. The printed pleading, in the edition of Sir George's works, makes them fifteen.

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has been mentioned, that John Brand, a boy under fourteen, was banished in this way. Andrew Maclaren, a boy of sixteen, charged with house-breaking, had also been banished Scotland in this form, by sentence of a Sheriff-court. On 22d December 1783, he complained of this by suspension, laid on the ground of his minority, the want of advice on the occasion, and certain objections to the libel and way of proceeding. But the Court of Justiciary were of opinion, that there was no ground of relief, and refused the bill.

Before dismissing this article, I shall only farther observe, that in fixing the measure of punishment which shall be inflicted on a pupil, the Court are not, cannot be confined to dispense it, according to years and days, but take into consideration all the circumstances, the equity of the case, and proportion their sentence to the character of the particular deed; so as humanity may be consulted whensoever it can, and the ends of public example be answered, when occasion shall require it. In this view, regard is not only to be had to the rank of the crime in the abstract, but also to the contrivance and way of execution of the particular deed; to the degree of concern which the pupil had in it, whether it was as principal actor, or only in the way of remote and inferior assistance; to the circumstance of his doing it single or with accomplices; and if with assistance, whether it was that of others of his own age, or of old and trained offenders, or perhaps of such who stood in a situation of awe and authority over him, and might constrain him to the adventure against his will.

Nature of the
Plea of Infanity.

II. NEXT, after minors, we may attend to the case of those unfortunate persons, who have to plead the more miserable defence of idiotry or madness, which, if it is not pretended,

but

but genuine, and is withal of the due degree, and is fully proved, brings the act to be the same as that of an infant, and has equally the privilege in all cases of an entire exemption from any manner of pain; "*Cum alterum innocentia concilii tuetur, alterum fati infelicitas excusat*". I say, where it is fully proved, and is of the due degree: For if reason and humanity enforce the plea in these circumstances; it is no less necessary to observe such a caution and temperament in the application of it, as shall hinder it to be understood, that there is any privilege of mere weakness of intellect, or of a strange and moody humour, or of a crazy and capricious, or irregular temper and habit. None of these things either are or ought to be law. Because such constitutions are neither exclusive of a competent understanding of the true state of the circumstances in which the deed is done, nor of the subsistence of some steady evil passion, grounded in that situation, and directed to a certain object. To serve the purpose, therefore, of an excuse in law, the disorder must amount to absolute alienation of reason, "*ut continua mentis alienatione, omni intellectu careat*," such a disease which deprives the patient of the knowledge of the true position of things about him, and of the discernment of friend from foe, and gives him up to the impulse of his own distempered fancy, divested of all self-government, or controul of his passions.

WHETHER it should be added to the description, that he must have lost all knowledge of good and evil, right and wrong, this is a more delicate question, and fit perhaps to be resolved differently, according to the sense in which it is understood. If it be put in this sense, in a case, for instance,

Nature of the
Plea of Infancy.

¹ L. 12. ad Legem Corneliam de Sicariis.

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stance, of murder, Did the pannel know that murder was a crime? Would he have answered on the question, that it was wrong to kill a neighbour? this is hardly to be reputed a just criterion of such a state of soundness, as ought to make a man accountable in law for his actions. Because it may happen a person to answer in this way, who yet is so absolutely mad, as to have lost all true observation of facts, all understanding of the good or evil intentions of those who are about him, or even the knowledge of their persons. But if the question be put in this other and more special sense, as relative to the very act done by the pannel, and the particular situation in which at that time he conceived himself to stand, Did he, as at the moment of doing *that thing*, understand the evil of it? Was he impressed with the consciousness of guilt, and fear of punishment?—it is then a pertinent and material question, but which cannot to any substantial purpose be answered, without taking into consideration the whole circumstances of the situation. Every judgment in the matter of right and wrong supposes a case, or state of facts, to which it applies. And though the pannel have that vestige of reason, which may enable him to answer in the general, that murder is a crime, yet if he cannot distinguish his friend from his enemy, but conceive every thing about him to be the reverse of what it really is, and mistake the illusions of his fancy for realities, with respect to his own condition, and that of others, “*absurda et tristia sibi dicens atque fingens*,” these remains of intellect are thus of no use to him towards the government of his actions, nor in anywise enable him to form a judgment upon any particular situation or conjuncture, of what is right or wrong with regard to it. If he does not know the person of his friend or neighbour, or though he do know him,
if

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if he is possessed with the vain conceit that he is come there to destroy him, or that he has already done him the most cruel injuries, and that all about him are engaged in one foul conspiracy to abuse him, as well might he be utterly ignorant of the quality of murder. Proceeding, as it does, on a false case, or conjuration of his own fancy, his judgment of right and wrong, as to any responsibility that should attend it, is truly the same as none at all. It is therefore only in this complex and appropriated sense, as relative to the particular thing done, and the situation of the pannel's feelings and consciousness on that occasion, that this inquiry concerning his intelligence of moral good or evil is material, and not in any other or larger sense.

BUT to return to the point whence I set out. Our practice has always been governed by the general precept, already mentioned, which admits of no defence, short of absolute alienation of reason. To that purpose, the interlocutor upon the case of Robert Thomson, indicted for murder, finds it relevant, and allows him to prove, "That when the fact libelled was committed, he was so furious, mad and distracted, *as to be totally deprived of his reason and understanding*; reserving consideration as to the effect of what should be found proven, until the verdict should be returned."

Cases of Infancy.

June 18. 1739.

THE same principle had governed in the conviction of Thomas Gray. This man was indicted for murder, by stabbing. It was alleged for him, that he was of very weak intellect, extremely passionate and flighty, addicted to the immoderate drinking of strong liquors, and, on the whole, what between the use of these and natural infirmity, rather a sort of fool or crazy person, and so considered by his neighbours,

July 26, 27. 1773.

CHAP. I.

Nov. 29. and
Dec. 12. 1763.

neighbours, than a sound man. This account was confirmed by the witnesses upon the trial, several of whom swore to his being drunk when he stabbed, and that he was at all times a weak and passionate creature, and especially (as they expressed it) "on the woodish order when he got drunk." All this was plainly short of madness in the sense of law, and the jury therefore found him *guilty* of the murder¹. The rule is farther confirmed by the case of Robert Bonthorn. The charge against him was, that being a smuggler, and having had contraband goods seized in his possession, he, out of revenge, laid hold of an opportunity violently to push the revenue-officer over a precipice upon the sea-shore, whereby the man had his thigh-bone broken, and was otherwise injured. The jury "find the libel proven, and also find, that "the intellects of the pannel are most remarkably weak, "irregular and confused, and therefore recommend him to "the mercy of the Court." He had judgment, nevertheless, to be twice whipped at different places of the county where he dwelt, and for a sum of damages and expences.

Feb. 22. and
Mar. 9. 1731.

For the same reasons which weighed in these cases, the defence of madness is less suspected, and will more easily be received, against a charge of murder, mutilation, or other violent crime, than of those offences, like theft or forgery, which can hardly be executed without art and steadiness of purpose. I find that in the trial of Thomas Henderson, for horse-stealing, it was pleaded for him, that he was subject to occasional fits of madness. But the libel charged, that he had conducted himself prudently in the adventure, having stolen the horse in the night, and ridden straightway by an unfrequented

¹ It was pleaded for this man, at recording the verdict, that he was *then* insane, and that sentence could not pass upon him. The diet was continued; and the case appears to have dropped out of the record.

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unfrequented road to a distance, where he left the horse, under a plausible pretence, and, last of all, sold it, and took a bill for the price. The interlocutor therefore did not take notice of this allegation, but repelled in general all the pannel's defences.

BUT although the distemper must thus be absolute in degree, it is not material that it be also total in respect of time. The quality of the action has no dependence but upon the pannel's state of mind at the time of doing it; so that whether his malady be constant and unremitting, or only return at intervals, still the defence will be equally available, if he was then utterly furious, and void of reason. And here I may cite the case of Sir Archibald Kinloch, which was that of a person, who, having had his senses injured by the acute delirium of a West India fever, was afterwards liable to occasional fits of derangement, though at considerable intervals, and at length, in a state of utter fury, had the misfortune to kill his brother. The violence of this fit had only been for a few days before the fact, and he soon after settled into his ordinary condition. Nevertheless, the jury were unanimous to acquit him.

Must the Infancy be constant.

June 29. 1795.

THE case of Robert Spence, also tried for murder, was in some measure of the same description. The pannel, and the deceased, who was a woman, and teacher of a school, were inhabitants of different floors in the same building. And it appears, that having risen in his shirt, in the dusk of the evening, and knocked at her door, he, upon opening, instantly rushed in, and uttering some strange and incoherent exclamations against the woman, knocked her on the head

Cases of Infancy at Intervals.

June 19. & 30. 1747.

CHAP. I.

with a hatchet, or chopping knife, which he brought with him. After dispatching her, he ran off to his own house, and when a *posse* assembled to seize him, he suddenly sprung out upon them, and attempted to escape. It was also a remarkable circumstance, that on returning to his house, he had taken offence at a wig-block which stood there, and violently clove it down with the same hatchet; so that it was found all besmeared with the woman's brains and gore. With regard to his symptoms of disorder for some days preceding, they were chiefly these; a great degree of restlessness, a disposition to ramble through the country at all hours and without an object, incoherent discourse, and disorderly behaviour, though without any act of outrage or violence offered to his neighbour. But it was farther proved, that some years before, when employed as a sailor, he had occasionally shown symptoms of derangement, which were aggravated by drinking, so that he had sometimes been confined on board of ship, for eight or ten successive days, as insane. The jury found it "proven, that the pannel was "furious at the time he committed the said murder, but "to what degree of fury, they could not determine." On which verdict, the Court ordered him into confinement, until bail should be found by his relations, to keep him in a state of safety.

Mar. 14. 1781.

THERE is one case more of the same character upon record; that of Jean Blair, who, with a hatchet, cruelly mangled and killed her mistress, with whom she had lived some years, as a confidential servant, and then, after setting fire to the house, and defacing the effects within it, ran out stark naked, and with her hands bloody, into the street, and gave the alarm of fire to the guard. It was proved that several of her family had been insane, and that she

she herself had shewn symptoms of insanity about ten years before. She was acquitted of the murder; but was ordered into confinement.

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I AM not sure, whether I ought to refer to the same, or to another class, the case, already mentioned, of Robert Thomson, which was tried in June 1739. It was, in all its circumstances, an extraordinary case. The pannel was accused of the murder of George Forrester, committed at mid-day, in the muir of Ballencrieff, and on the highway from Haddington to Aberlady, by knocking him down from his horse with a stone, and cutting his throat with a pen-knife, as he lay on the ground. The pannel was a blacksmith, and had been employed in his trade as usual, that very morning, till ten o'clock. And farther, not more than half an hour before the murder, two persons, who met him on the highway, had spoken to him in passing, and without observing any thing unusual in his appearance. A few hours after committing the murder, he was taken into custody, and in the afternoon of the same day, and in the course of conveyance to goal, he had so far recovered as to be sensible of what he had done. He pointed out the precise spot where he had killed the deceased; showed "the innocent blood" (as he called it) on the ground; said, that his own blood would be shed for it; and expressed concern on account of the distress which he would bring upon his father. He also related to the persons who had charge of him upon the way, that the deceased had many times cried for mercy, while he was striking him on the ground; but, "I trow (said he) I had no mercy on him, for I believed it was the devil that I killed." In the same strain he added, that before meeting the deceased, he had chased the

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at Intervals.

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the devil through the muir in another shape, "like a man with a whin-cow in his hat," and who suddenly vanished from before him in the pursuit. In confirmation of these strange circumstances, it was proved, that the pannel was subject to convulsion fits, especially at full moon, and that he was melancholy after them, and liable to be troubled with religious horrors, so that he sometimes started from his bed in the night, and spoke and acted as if he were grappling with the devil. He had been seized with one of these fits a few days before the murder, but it had not been followed with any extraordinary depression of spirits. The jury returned a verdict finding "no proof of fury or fury" till after the murder was committed;" as indeed no one was present to judge of his appearance at that time, and recently before he had been in his ordinary condition. Yet upon the whole circumstances there was little room to believe him guilty; and in this light the case had been viewed elsewhere; for he received a transportation-pardon.

Cases of sudden
Phrensy.

WHAT is still more strange than any malady of this kind, there have even been instances of sudden, and in a great measure unaccountable phrensy, and which, though excessive for the time, quickly subsided, and never again returned. And in these too, the plea of insanity has been sustained. A history of this sort is related by Sir M. Hale; that of a woman who was tried at Aylesbury in 1668, for the murder of her own child. She was a married woman, and of undoubted good fame and virtuous deportment. But not having slept for some nights after her delivery, and by this and other disorder of her person, having fallen into a sort of delirium, and being left alone, she killed her infant; which, presently after, she showed to some persons who came in, and

and told them she had done it. She was instantly carried to goal, where, in a little, she fell into a deep sleep, and on awaking, was found to have recovered her senses, and marvelled much, how, or on what account she had come there. The jury very justly found her not guilty of the murder¹.

VERY like this, though the verdict was different, was our case of Agnes Crookat, of the 23d July 1756. This woman also had killed her own child. She was an unmarried woman, but had called help to her delivery, and had openly kept and suckled the child for the space of six or seven days. It was sworn to, that at times, upon the day of the fact, she had been strange in her speech and behaviour, but to which the witnesses had not paid much regard; and being left alone with her child, she laid hand upon and strangled it. She kept it, however, lying openly by her in the bed, till the people of the house returned, and then she showed it them, and told them what she had done, and said, "that the devil had tempted her." The case was thus far weaker than the former, that there was no clear proof of bodily complaint, or of a marked transition from a state of disorder to soundness. The jury therefore found her guilty. But the royal mercy interposed to prevent her execution.

A THIRD case of the like character, was tried at Jedburgh, in April 1785, and issued in a verdict of acquittal. The pannel was a man named Robert Coalston, a husbandman or farm-servant. Some years before the fact, he had been struck with lightening, and from that time had occasionally been subject to melancholy and depression of spirits, but not in any remarkable degree, nor such as hindered him to do his business as a servant, and without any sort of tendency

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Phrensy.

¹ Hale, vol. i. p. 36.

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to violence or mischief. But of a sudden, and without any new or visible cause, the man became restless and impatient, and having left his master's house, in the middle of the night, set a roaming through the country, without plan or object, and behaving absurdly, as he went along, but still without offering violence to any whom he met. In the evening of the next day, he returned to his master's house; and by this time, having waxed outrageous, he abused his fellow-servants; assaulted and struck his mistress; and having suddenly snatched an infant out of her arms, which she had upon the breast, he ran off with it, out of the house. A few minutes after, the child and he were found together in an outhouse, the child dead, and dashed to pieces, and the man sitting quietly by it, as quite unconscious of what had passed. He made no attempt to fly or resist, and was carried to goal, where he soon settled into a state of languor and stupefaction; out of which when he recovered, in the course of a few days, he seemed to have no remembrance of these incidents, and suffered great agitation, on being told what he had done¹. The jury found the slaughter proved, but the insanity also proved; and he was ordered into confinement. In short, how unaccountable soever to us, these visitations of sudden and temporary madness, yet still they are within the compass of this miserable privilege, if the utter alienation of reason for the time be proved.

BESIDE those, of which an account has incidentally been given, I have found but one instance more of the plea of fury sustained, in which there is any thing worthy to be remarked; the case of James Sommerville, tried in

1704.

¹ These circumstances do not appear on the record; but are known to me, as counsel for the pannel.

1704. This man was one of the town-officers of Edinburgh, and had shot a foldier of the town-guard, one of a party which had been sent to seize him, on his becoming outrageous. These were the chief circumstances alleged in evidence of his insanity: 1. That three or four months before the deed, the magistrates of the city, having observed indications of derangement, had ordered him to keep at home, and appointed him a weekly allowance during his confinement. 2. He had conceived a jealousy of evil intended him, and had applied to the Provost for a safe conduct or protection, which was given him, out of indulgence to his humour. 3. About four months before the slaughter, he had called for a sword to kill his brother, who came to visit him. 4. He became slovenly in his person and apparel, instead of careful as formerly, and walked out into the street with his stockings loose about his heels. 5. He uttered strange and hideous cries in church, and in time of divine service. 6. On the morning of the day libelled, he ran into the street in his shirt, with a drawn sword, and threatened his neighbours. 7. On being committed after the fact, and desired to give up his officer's coat or uniform, he was scurrilous to the magistrate, and desired him "to go hang himself and his coat." 8. After commitment, he was so disorderly, that it was necessary to confine him in the iron cage. The Court "sustained the defence of his being mad, relevant to assoilzie him from the ordinary pain, the pannel proving that the same morning the defunct was slain, he went through the wynd in his shirt, with a drawn sword in his hand, threatening his neighbours, and any other *two* of the qualifications of fury condescended on, except the *fourth*, on which the Lords lay no stress." The

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jury

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Dec. 5. & 8.

Nov. 27. 1704.

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jury returned a special and aukward verdict¹, but which had the effect of saving the pannel's life.

Prefumptions in
cases of Infanity.

IN regard to the proof of furiosity : It is not disputed, that in the case of one who has always been reputed sane, it lies with the pannel fully to establish this, equally as any other, defence. But as to the case of lunacy or periodical madness, a controverfy is agitated in the law books touching the presumption on the subject, whether it shall be that the deed was done in furiosity, or in a lucid interval². One thing is obvious on this head, that there is no room for presumptions, unless in the case, which cannot be a frequent one, that the jury cannot come to a conclusion either way, upon the proof of the pannel's situation of mind, as at the time when the deed was done. For if there be a proof applicable to that period, and if it either establish no symptoms of disorder, or but very slight ones, it will not defend the pannel that he

¹ The jury " Find it proven, 1. That there was an warrand or order given
" by Baillie Warrander to go to the pannell, and endeavour by all fair means, to
" bring him with the said Baillie. 2. We find it proven, That the pannell threat-
" ned the persons that desired him to open the door, and go to the said Baillie.
" 3. We find it proven, That the time they were breaking up the door, Hen-
" derfon, the defunct, received a shot throw the lock-hole of the door, which
" gave him several wounds in his body, and that he dyed about twenty days
" thereafter. 4. We find it proven, That when the pannell opened the door af-
" ter the shot, he asked How all was? and he was told be Ferguson, Smith and
" Innes, that he had killed a man; to which he made answer, God have mercy
" upon my soul. 5. We find it proven, That some months before the fact, the
" pannell had acted like a furious or madman. 6. We find it proven, That af-
" ter the fact was committed, the pannell gave Baillie Warrander scurrilous lan-
" guage; and, lastly, finds proven, That at the time the shot was given, and the
" door opened, that Ferguson the officer, and souldiers, found the pannel and his
" wife together. 5th December 1704."

² See Mathæus, tit. *Qui Crim. adm. Poss.* No. 6.

he had formerly, (as was the case of Lord Ferrers); and for a length of time been insane. Now as to situations of a doubtful character, I can imagine but one, in which it may be reasonable to presume for the influence of disease upon the act. I mean the situation of a person, who ordinarily, and for a course of years has been insane, with but few, and short, and imperfect intervals of reason; and more especially this will be just, if he is found with the plain symptoms of furiosity upon him recently after doing the deed. One, for instance, who for years has been confined in a mad-house, if, taking advantage of the occasional liberty which is indulged him, on the faith of any seeming intermission of his fury, he shall make his escape from his friends, to whose society he has been restored, and shall kill a person when no one is by to bear testimony to what passes, and shall afterwards, in the course of the same day, be taken in a state of absolute distraction; he may seem to be within the privilege of this humane construction. In the case, on the contrary, of one whose lucid intervals have been longer and more frequent, the presumption upon a doubtful and defective proof shall be against him; though by reason of the faulty habit, and the natural suspicion of the lurking vice, where it has once shown itself, weaker evidence may here be admitted to cast the balance, than in the trial of one who has never been subject to this affliction. The situation is still more unfavourable to the pannel, if his ordinary condition be that of a sound man, or if his lucid intervals have generally been at stated periods, and of nearly the same endurance, and the deed is done within the regular period of such an interval. But truly it is a vain attempt to compress within a few short maxims, all the possible varieties and combinations of these miserable disorders. And

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on the whole, it will be much safer to conclude, that if ever so ambiguous a case shall happen, the question will rather be fit for the consideration of the jury, on the whole history and circumstances of the particular malady, as detailed in evidence to them, than for the resolution of the Court, as matter of law, by any general rule.

Judgment in Cases of Infanity.

WITH regard to the result of a verdict, finding the defence of furiosity proved, it cannot well be any other, than the entire acquittal of the pannel, "*cum satis furore ipso puniatur*"¹. And this, according to the remark of Sir Mathew Hale, must equally hold true, of whichever kind the madness be; whether it be attended with rage, fury, and tempestuous violence, or is only such as takes away the use of reason and memory, and leaves the person in a state of imbecillity and stupor; in which, if, as a machine, he do any evil, though without *impetus* or rage, it is not a proper act of his, for which he can be accountable in law. As to the inferior degrees of derangement, or natural weakness of intellect, which do not amount to madness, and for which there can be no rule in law; the relief of these must be sought either in the discretion of the prosecutor, who may restrict his libel to an arbitrary pain, or in the course of application to the King for mercy. Yet I find, that in one case, that of Sommerville, though perhaps not to be approved of as a precedent, a middle course was taken, by absolving the pannel from all corporal pain, but decreeing for a fine to the fiscal, and asythment to the widow and children of the deceased.

Dec. 8. 1704.

ONE matter, however, there is, for which, by just and uniform custom, the Court take order by their sentence, except

¹ Lex 14. tit. 18. lib. 1. Dig.

except in those rarer cases of delirium from fever, or other bodily disease, for which an undoubted momentary cause can be assigned. I mean the providing of security to the public, and to the pannel himself, against the danger of his malady, if unhappily he shall again be afflicted with it. To this end, in the case of Sommerville, the Court appointed him to be confined in the house of correction, "never to be liberated therefrom, but upon a certificate under the hands of the magistrates, and two known physicians, that he has convalesced, and become sound in his judgment." But more ordinarily, the course has been to qualify the order of confinement, by a humane provision, allowing the magistrate or keeper of the goal to deliver over the pannel to such relation, or other person, who shall find sufficient bail in the books of adjournal, to the satisfaction of the Court, and under such penalty as they shall appoint, to keep and detain him in safe custody for the future. Deliverance was given to that effect, in the case of Robert Spence in 1747, of Jean Blair in 1781, of Robert Coalston in 1785, and of Gordon Kinloch in 1795; in which last case, the penalty of the bail-bond was Ten thousand pounds.

III. I HAVE now said sufficient concerning the defences of nonage and insanity; and these are properly the only cases of incapacity of crime, that attaches to, and is inherent in, the person. But I shall subjoin some observations upon certain other situations, where a person altogether sane, and of the years of discretion, and therefore capable of committing crimes, may however be alleged to have a privilege, by reason of the particular circumstances which he is in at the time of doing the deed. And first, I shall say a word or two concerning that sort of temporary madness, which is

Of the Defence
of Intoxication.

produced

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produced by excess in intoxicating liquors. It has been alleged, on the authority of a single text, that for this sort of frailty the Roman law had such indulgence, as in every case to remit the capital pain *per vinum aut lasciviam lapsis* *. But it is plain, as well from the title of the chapter in the Digest, where this passage stands, as from the whole scope and connection of the law, of which it is a part, that this was no general precept of that system, but a special ordinance, relative to the case of a soldier, who wounded himself, or attempted his own life. Some have thought, that even among soldiers, it concerned him only, who, having slipped and fallen when in liquor, in this way accidentally gave himself a wound †. But however this may be, certain it is, that the law of Scotland regards this wilful madness with a quite different disposition from the other, which is the visitation of Providence, and if it does not consider the intemperance as an aggravation in the case, at least sees very good reason why it should not be admitted as an excuse for the offender, to save him from the ordinary pains of his transgression. For, not to mention that a person cannot well lay claim to favour, upon the ground of that which itself shews a blameable disregard of decency and order, How are the different degrees of ebriety to be settled, or the real ebriety to be distinguished from that which is affected; or what protection shall there be on this plan against the attempts of such who may inflame themselves with liquor, for the purpose of gaining courage to indulge their passions, and an opportunity to do it safely? Besides, if there were even no danger of such contrivances, a security is indispensable to be provided to the

* Lib. 6. Dig. de Re Militari, No. 7.

† Voet. Comment. in lib. 47. tit. 10. Dig. No. 1.

the peaceable and decent part of the community, who would otherwise be delivered into the discretion of the dissolute and worthless. For these substantial reasons, our custom utterly disowns this defence, and this generally, and without regard to that distinction, which has often been urged, but is not suited to practice, "*inter ebrios et ebriosos*," between such as are habitual drunkards, or are only accidentally in liquor. This was pled and repelled, in the case of Joseph Hume, in February 1732, which was a case of murder. Likewise in the case of Maclauchlan, in March 1737, for murder and riot, the general plea was argued and repelled; as it had long ago been in another case of murder, that of Hamilton of Green, and in many prior cases.

BUT although this be a just and salutary rule, in its application to crimes, such as those that have been mentioned, yet it seems to be questionable, though I have not observed that any author makes the distinction, whether the same holds equally true of all offences without exception. There are several offences of that nature, which neither are so tempting to the delinquent by any profit that is attached to them, nor are attended with any *necessary* or immediate damage to a neighbour or to society, and which indeed are chiefly reputed criminal, on account of the violation of order and decency, and the *possible* evil influence on the minds of such who come to the knowledge of them. Of this description are blasphemy, heresy, leasing-making, the uttering of seditious words, and some others, which are chiefly punished, as an insult to the order of the state, or as tending to lessen the respect of the hearers for the Prince, or their veneration for the truths of religion. Now, in any of these points of view, not only is the wickedness of the transgressor lessened in our opinion, if he was not in the
due

July, August
1716.
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of Intoxication.

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due possession of his faculties at the time, but the injury itself to the community, the possible harm and contagion of his example, is prevented; whereas, in a case of fire-raising, robbery, murder, or the like, the mischief is always the same, whatsoever, in that respect, have been the condition of the actor. But if a person go to hear mass in liquor, who is a good protestant when he is sober, or if an orthodox and pious citizen shall be prophane, or heretical, or blasphemous, in his liquor, or if a loyal and well affected subject in the same condition shall forget his principles, and utter calumnies against the King; in any of these cases, who is there that heeds or regards him? His example does not seduce, his doctrines do not lay hold of any man's mind, because they are not seriously taught, nor can be said to be truly his: The words are not even in the hearing so offensive to the ears of the bystanders, as in the mouth of one who advisedly utters them; nor can the State or Church reasonably feel the same resentment of them, as of a malicious and deliberate insult. Many other situations may be imagined, in which there seem to be the like reasons for mitigation of the ordinary pains; I say for mitigation, for I would not be understood to argue for entire impunity, nor even for mitigation, unless it appear on the whole circumstances of the case, that the transgression is fairly imputable to the condition of the man at the time. But in this I have only been delivering my own sentiment, which is not supported with any precedent, nay, has even to struggle with an express judgment to the contrary, and given too in a case which was favourable to the pannel. In 1697, Patrick Kinninmount was tried for blasphemy by railing against God, upon a libel which concluded for the pains of death. Among other defences, it was pleaded for him, that if he
ever

ever uttered such words, it was in a state of fury or distraction, occasioned by excess in liquor. The Court "finds the defence that the pannel was furious or distracted in his wits relevant, in the terms of the act of Parliament, but repels the allegiance of fury or distraction arising from drunkenness, and also repels the hails other defences." Yet it may be observed, with respect to the offences provided for in the statute 6th Anne, c. 7. that it is only by the malicious and advised assertion of the pretender's title, and the advised denial of the right of Parliament to limit the descent of the Crown by laws, that the pains of *præmunire* are incurred; which is thus far an adoption of the principle I have suggested, and in the sort of case to which I have applied it.

CHAP. I.
Dec. 13. 1697.

IV. LET us next consider the effect in law of that more favourable sort of constraint upon the will, which is not of the offender's own producing, but arises from the state of subjection in which he is with respect to others, by whose command he does the evil deed, knowing it to be wrong, and contrary to what his own free will would determine.

Of the Plea of
Subjection.

1. AND first, I shall speak of that subjection which arises by reason of the relations of private life, as that of the wife to the husband, the child to the parent, the servant to the master. With respect to the wife; That for any atrocious crime, such as treason, murder, or fire-raising, which she commits either in company with her husband, or in compliance with his command, she is equally liable as he to the ordinary pains, this never was denied to be law: for these things are *mala in se*, and against all the original feelings of right or humanity, which are paramount to the duties

As between
Wife and Husband.

F

of

CHAP. I.
July 18. 1735.

of the relation. To give but one instance of a rule which is so obviously necessary: In the case of James Brown and Elizabeth Chalmers his wife, where the charge was for jointly beating Brown's mother, so that she died, this was sustained as a capital dittay against both.

BUT even with respect to the less heinous offences, such as theft, reset of theft, forgery, or the like, I cannot learn that our law, like that of England, will be so indulgent to her, as to presume in her favour, that what she does *in assistance* of her husband, or *in his presence*, is done against her will, and out of dread of his authority, and on that ground to protect her from all manner of pain. According to any precedents that can be shewn in our records, if the husband and wife go out together and steal, or if the husband steal, and the wife receive the spoil into her private repositories and particular keeping, or if the husband

The Lords find, That James Brown pannell, having at the time and place lybelled beat or cursed the deceased Anna Cockburn his mother, relevant to infer the pain of death, and confiscation of moveables; as also, Find that the said James Brown and Elizabeth Chalmers, the other pannell, that they or either of them, having at the time and place lybelled, beaten the said Anna to that degree, that she of the stroaks given her, did shortly thereafter dye; or that they, or either of them, were art and part of the murder of the said Anna, relevant to infer the foresaid pains; and, *separatim*, the said Lords find, That at time and place lybelled, she the said Elizabeth Chalmers having beaten the said A. C. relevant to infer an arbitrary punishment. 4th August 1735.

* See Blackstone, vol. iv. p. 28.

³ *In certis autem casibus, tenetur uxor respondere: scilicet si furtum, vel maleficium aliquod viri sui, inveniatur sub clavibus suis, quas ipsa debet habere in custodia et cura sua; videlicet de spensa et arca robarum, et jocalium suorum; et de scrinio seu coffero suo. Et si aliquod furtum sub talibus clavibus inveniatur, uxor cum viro, culpabilis est. Statuta Wilhelmi, cap. 19.*

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husband forge the notes, and the wife is employed to put them in circulation, we will rather be disposed to follow the precept of the old laws of William for such cases; which holds both for guilty, and punishes them according to their demerits. "*Sed cum fuerunt ambo participes in crimine sic erunt quoque et in pœna. Et licet uxor obedire debeat viro suo, tamen in atrocibus obedire non debet. Et sic debet uterque puniri secundum demerita sua.*"

THE libel against John Bell, and Elizabeth his wife, for shop-breaking, reset of theft, and harbouring of thieves, was accordingly found relevant against either of them, and on conviction of the last of these charges, the same pain was inflicted on both. Likewise, upon the libel against David Pinkerton, Helen Baillie his wife, John Marshall, and Sophia Pinkerton his wife, which bore a charge of their being Egyptians, and guilty of diverse thefts, violences, robberies, and attempts to rob, committed by them in company, they were severally found relevant to infer death or arbitrary pain against Helen Baillie, and her associates; and it was only upon the consent of the prosecutor with regard to Sophia Pinkerton, who was a young woman, and the daughter of the pannel David Pinkerton, that the charge as to her was restricted to an arbitrary pain. The like relevancy had

June 11. 14. 18.
1736.

Aug. 22. 1726.

been

Find the said pannell Pinkerton alias Maxwell, John Marshall and Helen Baillie alias Douglas, pannells, or any of them, their being habite and repute to be Egyptians, forners or masterful beggars, in conjunction with the said pannells, or any of them, their being the times and places lybelled, guilty, art and part of the facts of violence, theft, robbery, or attempts of robbery lybelled, or any of the said facts, relevant to infer the pain of death, and confiscation of moveables: Find the said pannells, or either of them, their being guilty of any of the other facts lybelled, except the said murder and robbery last mentioned, or that they were art and part thereof, *separatim* relevant to infer an arbitrary punishment.

CHAP. I.

Dec. 14. 1698.

Nov. 25. and
Dec. 11. 1695.

been found in the case of John Baillie, his wife and children, another knot of the same society, and accused of the like transgressions. To these I shall only add the case of George Lamb and his wife, who, along with others, were accused of deforcing a messenger in the execution of a caption; and against these spouses in particular, it was charged, that having decoyed the messenger to their house, by promise of protection, they, after his entrance, extinguished the lights, threw open the doors, and gave access to a rabble to beat him. Now, this was found equally relevant against both: But they had a verdict in their favour.

AND truly I see nothing exceptionable in the disposition of our law: because the ordinary case will be, that the spouses mutually confirm each other in their profligacy, or if there be seduction in the case, it may as well be on the part of the woman, as the man. The utmost lenity, therefore, to which our practice might be inclined, would be to excuse the wife for venial trespasses or petty crimes, to which her obedience of his orders may have constrained her, and to mitigate her sentence for the more grave offences, if the circumstances of the case make it reasonable to believe, that she is the less guilty of the two. Perhaps, it may also be expected, that in the case of threats or violence employed by the husband to coerce her, a lesser degree of terror shall excuse the submission of the wife, who is habitually subject to his power,

¹ Find that part of the lybell anent the beating or invading the messenger or his assistants, relevant to infer the pain of deforcement; and likewise, found the qualifications following, *viz.* That the pannells invited the messenger into their house, and entered in commoning, and promised protection, and thereafter did blow out the candle, and opened the back-door, and let in the rabble, relevant jointly, *per se*, to infer an arbitrary punishment, and repel the defences proposed for the pannells.

CHAP. I.

power, and has not the same means of escape from his rentment, as a stranger. Last of all, it is not to be believed that in any case the wife shall be held guilty, or be implicated as art and part of the husband's crime, by affording him that harbourage or concealment and comfort after the fact, which the feelings of nature and duty require of her at that season of distress and terror, when her fidelity has become his only refuge¹. Neither, if she were disposed, is it to be presumed that she has it in her power, to refuse him this assistance.

2. WITH respect to children. If, with the father's presence and command, or perhaps in this instance his command without his presence, there concur the great youth of the child, it may procure him a mitigation of the ordinary pains, in the case of a high crime, or perhaps entirely absolve him, if the offence be venial or trifling. As it did in the case of John Rae, a boy of twelve years old, who being prosecuted for stealing four sheep, in company with his father, was assolized by the Court, "in respect of his nonage as said, and that what he did was "in obedience to his father's command." Mackenzie hath quoted this case as in proof of the general position, That the command of the father will entirely free the child from the guilt of the inferior offences; and on another occasion² he expresses himself more largely, as if this of itself would also mitigate the pain of the more atrocious crimes.

But

Subjection of the
Child to the Pa-
rent.

Jan. 21. 1662,

¹ *Uxor alicujus desponsata, non tenetur virum suum accusare, nec furtum suum, nec feloniam detegere; cum ipsa sui ipsius potestatem non habeat. Stat. Will. cap. 19. No. 1.*

² Tit. Punishments, No. 5.

CHAP. II.

June 9. 1673.

Mar. 6, & 9.
1671.

Of the Subjection of a Servant.

But it is plain that this decision, which is mainly grounded in the age of the pannel¹, will not support so broad a privilege; neither have I met with any other judgment which attributes any higher power to the command of a father, than as a favourable circumstance, along with others, to extenuate the guilt of the child. In the case, particularly of John Mackintosh, and Angus his son, where the father's order to commit the slaughter was libelled, and which was fully debated on all the other points, no such plea for the son was even ventured to be maintained. In that of Donald and Charles Robertson, it was, however stated, and upon full pleading was repelled; though the case was thus far favourable, that these pannels were boys, alleged to be under fourteen years of age, and the crime was only the casting down of certain houses, and carrying off the materials, to which their father claimed right as his own. Mention has also been made of the case of Samuel Pirrie, in later times, where the instigation of a mother-in-law to a boy of fourteen to steal, had not even the effect of saving him from judgment of death. Nevertheless, as in the case of a wife, it may be true that greater allowance shall be made for actual coercion or violence employed against the child, because of the situation of dependence, and habit of submission, wherein he stands with respect to the father.

3. The case of a servant, according to Mackenzie², is nearly the same as that of a child; so that the command of

¹ The plea is entered for him in the record in these words: "That John Rae younger, not being as yet twelve years of age, and so not *doli capax*, ought not to be put to the knowledge of ane affize."

² Tit. Art and Part, No. 5.

of the master entirely excuses him in the lesser crimes, and even saves him from the ordinary pain of the more atrocious, if the master is known to be cruel. But I conceive, that in this he is rather to be understood as speaking with relation to those cases, where, beside the order, the servant has to allege actual coercion by the master, and the reasonable fear of violence, against which he has no sure or near protection. As, for instance, if a person ignorantly engages as servant to a Highland depredator, and is carried out upon an expedition by his master and his associates, who, with threats and drawn swords, compel him to accompany them, and be present at their excesses. At least, if Mackenzie meant to lay down this position generally, his doctrine, for aught that I can find, is not grounded in the practice of the Court, as well as it seems not to be safe nor reasonable in itself. A plea of this sort was set up in the case of Dougal Macfarlane, tried for way-laying and beating an excise-officer, so that he died; which he alleged was done upon the order of his master and mistress, and in revenge of their quarrel¹. But this and all his other defences were repelled. The like defence had the same issue in the prior case of James Hamilton and others, tenants and dependents

Nov. 1737.

“ And in lesser crimes, the command of the master excuseth altogether, *Lex Homo, ff. ad Leg. Aquil.* Now, I subsume in the terms of this, that whatever was done by me in this affair, was done by the command of my master or Mrs Macara, both, or one or other of them. Whatever it was that happened, or was intended, all was done at the command or desire of my said master and mistress. If they had bid kill, I own it might have looked odd to plead their mandate, for a crime that nature starts at, but to *cuff* is not so shocking to nature, and a master or mistress will readily be obeyed in such a case by their servant, especially in the *Highlands*, where almost unlimited obedience is paid to superiors, and such chastisements not much reckoned on. And the mandator is liable for the excess, as well as for the precise fact he commissioned to be done.” This is a passage from the information for the pannel.

CHAP. I.

Jan. 3. 11. 1726.

April 8. and
July 1. 1717.

dependents of the Earl of Roseberry, who pled their master's warrant for deforcing certain officers in the execution of a poinding of his effects. They were convicted, and had sentence for the statutory pains of deforcement. More expressly still, the same judgment had been given in the older and more favourable case of James Graham. This man was accused of a robbery, committed by him in company with the noted Rob Roy Macgrigor and his gang. Two defences were pleaded for him; the one that he was coerced by force of arms, and dread of his life, the other that he was a servant under the command of Roy, or of a person who was one of his gang, and was therefore to be excused from the ordinary pain; in support of which position, the authority of Mackenzie was produced. Now, only the first of these defences was sustained.

Of the Plea of
Compulsion.

4. IN the case of persons who are not connected by any of these relations, it seems proper to distinguish between situations of great commotion, or extensive danger, and the ordinary situation of a quiet and well regulated society. In time of war or rebellion, by which the magistrate is overpowered, and the protection of the law suspended, allowance must be made for individuals, if, in this helpless state, they to a certain extent suffer the great law of self-preservation to govern their conduct for the time. A person is not therefore guilty of treason, who being in a part of the country that is commanded by the rebels, yields them against his will supply of money, or of arms and provisions, having no means of declining their demands, and being in the reasonable fear of military execution if he refuse. I shall not even say whether this may not go the length of excusing him, though he be with them for a time in arms, provided he

prove

CHAP. I.

prove a special and outrageous compulsion of him in that particular, and that he quit them with the first opportunity, and do no act of hostility while he remains with them, other than is fairly imputable to the constraint of his situation. There is an instance of the former in the case of William and John Riddell, indicted for treason, in furnishing the rebels with provisions, and transporting their cannon. The Court "find the defence proponed for the pannel relevant, " he always proving *vis major* and force to every act of " furnishing the rebels with meat and drink, and assisting " them in carrying of their cannons, to elide that part of " the dittay."

Nov. 7. 1681.

THE same excuse may even be admitted in cases of less extensive commotion, if the situation be truly such with respect to the individual, that he is in a state of helplessness and danger for the time. A mob, for instance, or tumultuous convocation, are moving on their enterprise; and on their way, as sometimes happens, they take possession of such as they meet, and compel them, in appearance at least, to take part in the adventure, and augment their strength. There can be no doubt that such an allegation, duly qualified, and made out by apt *indicia*, and not contradicted by other circumstances of an opposite character in the behaviour of the pannel, is relevant to acquit him of the charge. Here I may quote the case of Andrew Fairney, James Purdie,

Cases of Crime on Compulsion.

* The affize find, " That the woman did carry ale, and did deliver ale and " bread, to be carried to the rebels; but finds it not proven, that the pannell " William Riddell had any accession thereto; and as to the furnishing of malt " lybelled, they all in one voice assoilzie the pannell *simpliciter*, because he was " compelled thereto." On the 21st November, he was ordered to be set at liberty, on taking the test.

CHAP. I.

July 25. 1720.

Mar. 9. and 12.
1741.

Oct. 11. 1725.

die, and others, where, in as far as concerns Purdie, the interlocutor is thus: "And for eliding the qualification libelled against James Purdie, *viz.* That he carried and beat a drum amongst any of the said mobs, sustains the defence relevant, that he was forced and compelled thereto by the said mob." The defence of constraint and compulsion was also found relevant in the case of William Gilchrist, indicted as one of a mob, who broke into and plundered a mill¹. Likewise in the case of Robert Main and others, we find both the rule and the proper limitations of it set forth as follows: "Finds the said Robert Main's defence, *viz.* That he was forced to take a gun by the disorderly people who were running that way, and who threatened to knock him down if he would not take it, relevant to exculpate him as to his being in arms, by having the said gun in that place where he was so forced, but not relevant as to his having the gun in any other place, unless the force was so continued, that he could not with safety lay his gun aside, or withdraw from the company who forced him."

ONE of the charges, which seems more readily than most others to admit this defence, is that of piracy: Because it often happens that those who are engaged in this lawless and desperate course of life, do by main force, from which there is no relief in these circumstances, compel the mariners on board the prizes which they make, to pass into the piratical vessel, and take part with them in their misdeeds. On the trial, therefore, of Roger Hews and sixteen others,

¹ "Find the lybell and several articles thereof relevant to infer the pains of law; but allow the pannell to prove the alledged force and continuance thereof, and his conduct and behaviour during the time of the riot, for elideing or alleviating any part of the said lybell."

others, in the Court of Admiralty, the judge "sustains the
 " the defence proponed for the pannels, that they, or any
 " one or more of them, were compelled to join themselves
 " with the pirates by force, or through fear, by the pirates
 " threatening the pannels to deprive them of their lives,
 " and that during the committing of the several piracies
 " set forth in the indictment, the said pannels continued
 " under such force or fear." The jury "found the de-
 " fences of force, and fear of death, and sickness, pro-
 " ven," in favour of seven of the pannels, who were ac-
 " cordingly dismissed from the bar.

CHAP. I.

Nov. 15. 1720.

FARTHER still, there may be situations, though more un-
 common now than they once were, of a more special and
 private violence, which shall be judged by the same rule.
 In the beginning of this century, while some parts of Scot-
 land had not yet been reduced to the due state of discipline,
 or sense of order, but were infested with gangs of ruffians,
 who levied contribution, and committed all manner of ex-
 cess without fear or restraint, the condition of those quar-
 ters was truly little different from a state of war. So that a
 person, himself nowise disposed to such a way of life, might for
 a time, through near neighbourhood, or by reason of offence
 given them, or the like, find himself entangled in some share
 of a criminal enterprise, entirely against his will. The case,
 already mentioned, of James Graham, seems to have been
 of this description. The charge against him was, that in
 company with Rob Roy and his gang, he had gone armed
 to Chapel Arroch, and there seized, carried off, and robbed
 the Duke of Montrose's steward, who had gone thither to
 collect his master's rents. He pled, that in the night pre-
 ceding this robbery, the house in which he lived was beset

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on Compulsion.

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by Rob Roy, with fifteen armed men, who commanded him to come forth, and on his refusal threatened him with pistol and drawn sword, to shoot or cleave him to the teeth, and at length dragged him out and forced him away, as well as they renewed their threats, on his attempting to escape from them in the course of their expedition. These things the Court found jointly relevant *simpliciter* to acquit him. As also, they found it sufficient to restrict the charge to an arbitrary pain, that though not at first forced out by such extreme violence, he was, however, under restraint by force, at the time when the robbery was committed¹. The jury found it proved, "That he was present in arms along with Roy and others at the time when the robbery was committed, but that he was forced into the service in manner mentioned, and that he was not possessed of arms to make resistance at the time." Upon which verdict he was affoizied.

IN this particular case, the defence seems to have been fully made out. But generally, and with relation to the ordinary condition of a well regulated society, in which every individual is under the shield of the law, and has opportunity of resorting to that protection upon any apprehension of violence, this is at least a difficult plea, and which will hardly be effectual against the charge of any atrocious crime,

¹ 1st July 1717. "Sustain the defence proponed for the pannell, viz. That he was compelled by being threatened with a pistol or drawn sword, and dragged out of his master's house by two of Rob Roy's men, the day before committing of the crimes lybelled, and that he continued under restraint by force of arms, the time of committing the said crimes, jointly relevant to affoizie *simpliciter* from the indictment; and likewise sustain this defence, that the pannell, the time of committing the said crimes lybelled, was under restraint by force, relevant to restrict the indictment to an arbitrary punishment; and repell the haill other defences proponed for the pannell."

crime, without the concurrence of these qualifications; an immediate danger of death or great bodily harm, an inability to escape that danger, or resist the violence, a backward and subordinate part in the business, and disclosure of the guilt, as well as restitution of the profit, with the first safe and convenient occasion. For, if either the panel take a very active part in the execution of the crime, or if he conceal the guilt, and detain his share of the profit, after his return to a state of freedom; any of these replies will in a great measure elide his defence.

5. I SHALL be very brief in speaking of that subjection, which arises out of the relations of a public nature, as between the judge and the legislature, the magistrate and the ministers of the law under him, or soldier and commanding officer.

Subjection of
Magistrate to
the Law.

It may be a question in morals, in the case of a judge who finds it enjoined him to execute an unjust and oppressive law, whether he ought not rather to resign the office, which engages him in such difficulties, and thus sets law and conscience at war. But in no human tribunal can the subject of any land be called in question for execution of the subsisting laws: It is only in virtue of those same laws that he is vested with the office of judge, and in opposing or refusing to obey them, he would destroy the very source of his own authority and commission. The judges of former times were not therefore punishable for trying traitors in absence, after the statute which passed in that behalf, nor for executing the laws against witchcraft, upon conviction obtained according to the approved customary mode of evidence in the practice of their day.

IT

CHAP. I.

Subjection of
Officer to the
Magistrate.

It will not in every case be governed by the same rule, if, through gross ignorance or carelessness, the magistrate pronounce an unlawful sentence, which is carried into effect by the inferior ministers of the law, upon his warrant. Take for example the case of a murderer, executed upon sentence of the Sheriff-court, which cannot try for murder, or the case of capital sentence, which erroneously orders execution to take place within the period, which is allowed the convict by the statute in that behalf. It may seem that there is room for a distinction in this matter, according to the officer's state of information, at the time when he proceeded. If it can be shewn that he was in the knowledge of the nullity, or had reasonable ground of suspicion on the subject, which may sometimes be from the nature of the thing itself, as if the order were to poison a convict, or privately to strangle him in goal, certainly he shall have no excuse in the command of his superior, whose wrong he thus adopts and takes upon himself; for if in these circumstances he obey the warrant, it is out of choice, and he cannot be held free of *malus animus* towards the person, whom he thus wilfully, deliberately, and unnecessarily destroys. But, which is more probable, if the officer proceeded without any knowledge or suspicion of the wrong, and having the accustomed warrant under the hand of his superior, this seems either to be no crime at all on his part, or, at least, it is both lower in degree, and of a different kind, than that of the judge, and can only be punished in the officer, on the expedient principle of teaching the highest caution to all concerned in the conduct of this interesting part of justice. For, in like manner as the law is paramount to all classes of people in the kingdom, so where the political establishment places one officer in authority over another, the obedience of the inferior

inferior is truly obedience to the law, which has given him this general direction for his conduct. Neither, if he was not warned, can he be held blameable or careless, that he did not discover the error into which the magistrate had fallen; for he was entitled to repose in confidence of the superior skill and attention of that person in the department of his duty. He intended to do a lawful act, and had right to think it such; whereby the error in that respect is thus, as to him, an error in point of fact only; which ought to excuse him, as that sort of error does in other cases. It is quite another question, where a person, acting of his own choice, happens, upon an erroneous apprehension of the law, to do an unlawful thing, to plunder a wrecked vessel, for instance, or to kill an outlawed or excommunicated person. For the judge cannot excuse this ignorance in one who is acting without necessity, and who ought therefore to be sure of his warrant, before he venture to put forth his hand against the goods or person of his neighbour.

WITH regard to soldiers, who are trained to a still stricter discipline, and are bound to obedience of orders by far higher penalties, I shall only say, that any plea which may be grounded upon these favourable considerations, must at least be received under certain provisions, without which it would both be very dangerous and unjust. The order must be such which falls within the bounds of the officer's commission, and known customary line of duty, and though given in his proper department, it must farther be at least an excusable order, or of that nature to be the subject of different opinions, not a plain injury and aggression on his part. If he should order out a party to rescue him from a messenger, who has him in custody for debt; any slaughter

Subjection of
Soldiers to Of-
ficers.

CHAP. I.

Feb. 5. and 6.
1674.

Aug. 1692.
July 1736.

Plea of Compul-
sion by Want.

or other injury which ensues upon so irregular an enterprise, would be at the equal hazard of the officer, and of all who are concerned in the execution of it. And the same would be true, if, being on guard with his party, he should order them to fire upon an inoffensive meeting of the people; a command which he is punishable for giving, and which they may lawfully disobey. The case of William Ferguson and others, soldiers in the Earl of Errol's regiment of militia, was a plain unfavourable case in both of these respects: For the pannels and their party had been sent out to poind for deficiencies in the quota of militia-men, upon the warrant of their officer only, who had no right to give such a warrant, and they had been guilty of great excess and precipitation in putting it to execution. But cases of this description have been rare. And in those, which more frequently happen, of an ambiguous character, the humane consideration of the situation of the soldier, who has acted in the belief of duty, and under the habit and constraint of military discipline, has generally made the prosecution be confined to the officer alone, as source and author of the wrong. This was the course in the case of Captain Wallace; and in the still more noted case of Captain Porteous; though in both the order to fire had been obeyed by all, or many of the party, under the officer's command. But I do not intend to enter at large, into an article of such delicate discussion.

6. I KNOW not, if it is necessary to take notice of one other sort of constraint, that which arises from the pressure of extreme want, and has tempted to the doing of such a thing, as serves to the support of nature for the time. As might be expected, jurists have differed about the justice of punishing in such a case, some affirming that the notion of
dole

dole is utterly excluded in these circumstances of misery, or at least that they are a plea to mitigation of the ordinary pains, while others deny that they are at all available in law. With us, reference is made in support of the merciful opinion, to that chapter of the *Regiam Majestatem*, entitled, *de Lege Burthynsack*, under which, according to one construction of it, a man is not at all to be punished for the theft of a calf, or a ram, or of as much meat as he can carry on his back. But the passage does not distinguish whether the thief be necessitous or not; and taking the whole sections of the chapter in connection, the meaning may rather seem to be, that for a theft to this amount, a person shall not be punished capitally. In which sense it had been understood by Skene^{*}, who says, with reference to this law of Burdinsack, that such a thief "should not be put to death but "should be scourged." Whatever may be its true meaning, the passage will not now be of much weight in the solution of this important question; which seems not to be attended with any peculiar difficulty, if, instead of resorting to artificial arguments, it be but treated on the obvious and substantial grounds in the nature of the case. Certainly there is a wide difference between a single act of theft committed in this situation of distress, and the rapacious invasion of the property of others, by one who makes a trade of such injustice. Yet, on the other side, the danger, or rather the impracticability, is evident, of incorporating this exception into the common law and practice of the land, and subjecting it, like other defences, to the discussion of the judge and jury. If there were no other obstacle, where is the possible rule, by which to settle the due measure of distress, which shall excuse? Or how shall the real necessity be known

B. 4. tit. 16.

H

from

^{*} Skene's Treatise of Crimes, cap. 13. No. 9.

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from that which is pretended, or that which comes of innocent and unavoidable misfortune, from the just consequences of a vicious or criminal course of conduct? Yet to distinguish in this matter according to the sources and occasions of the indigence, and therefore to investigate the whole history of the offender's life, would be indispensable to justice, if in any case the law were to listen to this excuse.

BUT truly, there are far higher considerations against the admitting of such a rule, which would at once infringe all security of property, by confounding the common notions of right and honesty among the people, and throwing into every man's own hand the estimation, in the first instance, of his own wants, and of the impossibility of relieving them in any more lawful course. It is grounded, therefore, in sound reason, and substantial justice, and is, as I conceive, the settled law of Scotland, that the judge shall apply the ordinary pains of law in this, as in every other case, where a person knowingly, and for his own advantage, has taken the property of his neighbour; leaving it to the necessitous offender to supplicate his relief from the Sovereign, who is the source of mercy, and who will not refuse to listen, if there be cause for him to interpose. Thus the rigid and salutary precept of the law is maintained entire, and humanity at the same time is consulted, without the risk of any of these multiplied evils and disorders, which would follow on a more enlarged scheme of indulgence. And herein, according to the judicious observation of Judge Blackstone, appears the benefit of that monarchical form of government, which so naturally admits of this gracious prerogative, which in more popular governments is the object of jealousy, and cannot so easily, nor to the same advantage, be arranged.

CHAPTER II.

OF THEFT AND STOUTHRIEF.

IN considering that class of offences which are committed against the property of another, I naturally begin with the crime of theft, that sort of invasion of property, which being attended with a profit to the offender, as well as a damage to the owner, is more frequently committed than any other. And first, of the nature of the crime: whereof all the necessary qualifications seem to be set forth in that short description of it, given in the civil law, *contrectatio rei fraudulosa, lucri faciendi gratia*; the felonious taking and carrying away of the property of another, for profit.

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I. THE fundamental circumstance, and which all the others only qualify, is this of the *taking*, or as our lawyers, after the stile of the civil law, have sometimes termed it, The Contrectation of the Thing. In which it is implied, that the thing has not previously been in the possession of the thief, but in that of the owner, or some other person for him, out of which the thief, without consent of the owner, removes it. Now with this article, simple as at first it appears to be, opens a wide field of discussion; as upon the

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due understanding of this matter, in some measure depends the distinction between theft, and those other criminal, but as the law deems them, inferior offences, of fraud, swindling, and breach of trust, which are nearly allied to theft, and liable to be confounded with it. And here, without pretending to furnish an invariable criterion for distinguishing these offences one from another, or to resolve all those nice debates, which have exercised the ingenuity of the ablest lawyers of either kingdom, I shall rather content myself with stating, on the one and the other part, certain descriptions of cases, which are clearly referable to different denominations of crime; hopeful that in this course the circle of controversy shall at least be narrowed, if not some notion attained of the true principle, on which the decision of the still more difficult situations may turn.

Distinction of
Theft and
Swindling.

I. IN the first place, all cases seem to fall under the notion of fraud or swindling only, and not of theft, in which the pannel attains possession of the thing on a title and bargain as for the *property*, upon credit, though the bargain be accomplished by means of cozenage and falsehood. As in the case of one, who falsely pretends to be partner of a certain thriving house, and thus buys and gets delivery of goods, to be paid at a future day. Or as in the case of Thomas Hall, tried in July 1789, who came to Edinburgh, falsely pretending to be a trader, and in prosecution of this plan hired and opened shop, and having, on the trust of this character, obtained goods from sundry dealers upon credit, suddenly disappeared, and carried off the goods along with him. In all cases of this description, the offender's wrong lieth only in the false and fraudulent inducement, which he has held forth to the owner, for prevailing on him to contract. But how

how unfairly soever he obtained it, he hath actually had the consent of the owner to convey that thing to him in property, to be his, and in all respects at his disposal, till the day of payment come. Which bargain being followed with delivery of the thing, the property thereof, notwithstanding the fraud, in the mean time passeth to the buyer; in so much that any one who should *bona fide* buy and get delivery of this same thing from him in course of trade, would not even be liable to the first owner's claim of restitution, which is only personal against his own customer, the author of the wrong. The owner, therefore, has himself only to blame in such a case, that having his choice to sell on credit or for ready money, and thus to be absolutely secure, he voluntarily chose the former, and knew not the person better, whom he dealt with on such terms. He relied, in contracting, either on the faith of the buyer, that he would not attempt to cheat him, or on his own sagacity, for discovering any such evil purpose, and his interest must be ruled accordingly; whereas in the case of a theftous abstraction, there is no giving of the thing to the offender, out of any reliance on him, and to be his own, but a taking of it by him, without even a seeming title of property or consent of the owner. In the case of Hall, the offence was therefore prosecuted as fraud, and not as theft¹.

2. EVEN

¹ Notice may also be taken of the case of Robert Taylor, 26th January 1674, who was charged with theft and stouthrief on this ground, that the parties being together at a fair, and having gone into an alehouse, they there bargained for the sale of ninety-five oxen, at so much a-head, which was to be paid either instantly, or within a few days. The buyer's servant, in the mean time, without the pursuer's consent, drove off the cattle cross the border, and the pursuer having followed to Carlisle, he was there, under pretence of a debt to the pannel, imprisoned. On this *species facti*, where the intromission was on a bargain of sale, and

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Distinction of
Theft and
Breach of Trust.

2. EVEN if the thing be delivered by the owner upon some lower title than that of property, as in the case of a watch given to another in loan, or of a horse let to hyre, or a pack of goods sent by a carrier, to be delivered at a certain place, the after-conversion of the thing to the possessor's own use, by selling the watch or horse, or opening the pack and abstracting the contents or part thereof, though it is a wrong, and even a criminal act, does not however amount to the crime of theft. The reason lies here, That there has been no felonious *taking* of the thing out of the owner's possession. Upon these cases, as above imagined, the man at first had obtained the thing honestly, by a fair contract, in ordinary course of business, and meaning no other, as at that time, but to restore or deliver it, according to his duty. At the instant, therefore, of delivery made in pursuance of that contract, the owner's possession ceased. The pannel was thence forward in the lawful possession for himself; and when he converts it to his own uses, from a purpose which is only afterwards taken up, and is probably suggested by his command of the thing, he cannot be held to have taken it from the owner; since, without any wrong or felonious intention, he already had it. To consider the thing as returned into the hand of the owner, from the time when the use to which it was given had determined, whereby the after-conversion of it to the holder's profit might fall to be deemed a new taking from the owner; this, though adopted by some authorities, seems to be a pure artificial, and

and not insisted to have been *absolutely* for ready money, and not accompanied with a pointed averment, that the whole transaction was from the first a trick, the pursuer found it necessary to desert his charge of *theft*, and turn it into a charge of oppression, which, in the end, was found irrelevant.

and indeed unnatural view of the situation, and such as ought not to have any countenance from the law, because tending to equalise the guilt of two acts, which in themselves are of different degrees, and ought to be chastised with unequal pains. In as much as his depravity, or at least boldness, is not so great, who is only tempted to keep a thing, which is already in his hands, and which came fairly into them, compared with that of the person who exerts his invention, or makes venture of his person, feloniously to withdraw the thing from the care and keeping of the owner.

THE distinction between the two sorts of act will better appear, if we add but one circumstance to any of these cases, the more clearly to show that the purpose of lucre was not the original inducement of the contract, but a new purpose, which only arose after delivery of the thing. As for instance, if the holder of the hired horse be taken with personal diligence upon his journey, and sell the horse to his creditor, to relieve his person, and receive and spend the balance of the price. Yet this is not a fundamental alteration of the case, but matter of evidence only, to establish that the dishonest purpose has but lately been taken up; a thing, which if the offender gets the subject on any common contract, must be presumed in his favour, till proof be made by circumstances, that he from the first intended to defraud.

3. If this be true of these situations, still less can there be any doubt of such, wherein the whole wrong lies only in the failure to re-deliver the thing, according to contract or promise: As in the case of a thing lent me, to be returned by a certain day, if I keep it longer; or in the case of a horse hired to a certain place, if I ride it farther in the same direction; or in the case of the carrier, if he keep up the pack
of

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of goods, but unbroken, and without concealment, after his arrival at their place of destination. Were it nothing more, there is this objection to the charge of theft in these situations, that the circumstances do not yield that decisive evidence, which cannot be dispensed with, of the holder's purpose to appropriate the thing to himself. The definition of theft in the civil law, *L. 1. No. 3. Dig. de furtis*, does indeed reach any usurpation even of the use or possession of the thing; but this can be no rule for our practice, in which the pains of theft are not patrimonial only, as in the Roman, but reach the person, and even the life of the offender.

Of Theft and
Breach of Trust.

4. THE same principle which protects the trespasser in the case of delivery to him for some limited and temporary use, will more strongly apply in his favour, in proportion as he has the thing upon a higher interest of his own, and by a contract which was meant to vest him with a fuller management and command of it. A creditor, who has his debtor's property lying in pledge with him, is not guilty of theft if he shall irregularly use or sell it; for such is his interest in the thing, that the owner would be guilty of a crime, and as some allege, would even be guilty of theft in certain circumstances, if he should secretly withdraw it from his possession. Another apt illustration may be in that sort of interest, which a hired servant hath in the clothes and habiliments of his body, furnished him by his master; which articles, though they are not the servant's property, (since the master may insist that he shall leave them at quitting his service), are, however, far more proper to him than his master's plate, or other things committed to his keeping, and belong to him by such a right, as shall at least hinder any prosecution of him as a thief, if either he shall run off with

with them upon him, or shall sell them while in the service. This point was tried with us in the case of Alexander Steill, against whom it was charged, that beside money and writings, he had carried off certain arms and articles of wearing apparel, the property of Captain Barclay. It was stated in defence, That the pannell was Captain Barclay's servant, and received his master's clothes and other necessary furniture, to which he need prove no other right, than by his having the delivery and use of the articles; and that to make a relevant charge, the pursuer must specify a theftuous contrectation of the clothes, as by withdrawing them from his master's study, cabinet, or trunks'. The Court sustained the charge with respect to the writs and money; " and as to that article of the dittay, " anent the stealing of cloaths and arms, finds the same not
I " relevant

THEFT AND
STOUTHRIFE.

Aug. 13. 1669.

* Sir George Lockhart pleads for the pannell, " That although the dittay were " more special, yet the samen cannot be put to the knowledge of an inquest, be- " cause as to the species of the particular goods condescended on in the pannell's ex- " culpation, his intromission therewith can import no *theft*. In respect it is offer- " ed to be proven, that the pannell, being servant to Captain Barclay, did actually " wear and make use of the said cloaths and goods during that year of his ser- " vice; and whilk using of the samen is sufficient to infer a right thereto, with- " out necessity to prove it otherwise, and beyond all question is sufficient to purge " all theftuous contrectation, although the pannell had intromitted and car- " ried them away; there being nothing more ordinary than for servants during " their master's service to get cloaths and other sicklike furniture, and it were " most absurd and unjust, that servants making use thereof should not be such ane " qualification of the right and possession, as though they did carry them away, " it cannot infer the crime of theft against them." He afterwards adds in a reply, " The libel must be circumstantiate, that it must convincingly appear, " that the pannell's intromission was not warranted by ane preceeding delivery, " but was a clear theftuous contrectation, as for example by proving that the " goods lybelled, the time of the pannell's intromission, were in such way and " manner in Captain Barclay's possession, as being in his trunks, cabinets and " studies, as does clearly make out his right thereto."

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“ relevant, except it be qualified specially, that he stole
 “ these goods such a-day, forth of the house of Auchreddie,
 “ and that they belonged to Captain Barclay, and were in
 “ his possession, and that the same were stolen by breaking
 “ of doors, chests, or trunks.”

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 Breach of Trust.

UNDER the same rule falls the case of a factor, who runs off with his employer's rents, after receiving them from the tenants, or even, (which is stronger), the case of an overseer or steward, entrusted with the management of a farm, who privately disposes of the grain and other commodities, the produce of the land, and receives the price to his own behoof. The wrong of this proceeding does not lie in the disposal of the things; for this falls under the powers of the steward's office: Neither will the clandestine manner of disposal make it theft, or a taking from his master, who has put the produce out of his own hands, into those of the steward, to be by him administered at his discretion, so he faithfully account for the value. It is, therefore, in the short accounting, and concealment of his receipts, not in the withdrawing of the species or *corpus*, that the guilt of such a trespass lies, which, though criminal, is however only a fraud, or breach of trust, and a distinct offence from theft. Such a charge had been brought by the Earl of Roseberry against his steward Archibald Tait, before the Justices of West-Lothian, who gave sentence for pillory and banishment. Which being challenged by Tait in a suspension, among other reasons urged was this, That the Justices were not competent to try a charge of theft. The Court found,
 Feb. 15. 1776. “ That the libel or complaint brought by the Earl of Rose-
 “ berry and the procurator-fiscal against the said Archibald
 “ Tait, before the Justices of Peace of the county of Lin-
 “ lithgow,

"lithgow, did not contain a charge of theft, but a charge of fraudulent concealments of the proceeds of his master's goods, and by false contrivances endeavouring to prevent these proceeds from coming to his master's knowledge; find that such charge was competent to be tried by the Justices without a jury."

THEFT AND
STOUTHRIFT.

IN general, it seems to be true of all persons, who are in a responsible state as officers, and are entrusted not with the care only, but the proper possession of money, such as cashiers and tellers of banks, collectors of taxes or parochial rates, treasurers of bodies corporate, judicial factors and the like, that they are not punishable *as thieves*, but as criminals of an inferior order, for any dishonesty or malversation in their charge. It is implied in the nature of such appointments, that the officer has more or less an administration, a discretionary power, over the cash in his hands, with which he is trusted in the mean time, upon his contract with his employer, and in reliance on the surety which he has found to be faithful; so that his obligation is not like that of a mere hand, for the money received as a special *corpus*, to be made forthcoming in the individual, and which is held to be already in the possession of his master through him, but for a just account of his receipts in general, to which he may also be compelled by a civil action. The Roman law says, with respect to a situation of this sort, "*Siquis pecuniam ita deposuerit, ut neque clausam, neque obsignatam, sed numentatam tradiderit; quo casu nihil aliud eum debere (accipendum est) apud quem deposita est, nisi tantundem pecuniæ solvere.*"

Of Theft and
Breach of Trust.

On this principle went the judgment for arbitrary pain, in the case of Robert Pringle, the teller of a bank, who was

Feb. 26. and
Mar. 2. 1705.

12

convicted

CHAP. II.

Failure to re-
store Things
found.

convicted of embezzling the money under his charge, to a considerable amount ¹.

5. THE cases which have now been put, are all such in which the offender got the thing by the act and will of the owner. But it seems to be an equally available defence, if the thing came to him, though against the owner's will, in any lawful and warrantable manner, without *tort* or transgression on his part in the apprehending of it. A landholder finds a stray animal in his field, or a treasure in his grounds, or has wrecked goods thrown in upon his shore; or a passenger finds a pocket-book upon the highway, which has the owner's name marked in it; or a hackney-coachman finds a parcel in his coach, which was left there by such a passenger, whom he some time before set down. It seems not to be a theft in any of these cases, if the holder, yielding to the opportunity and temptation, shall hide this thing, which however does not in any of these cases belong to him, and keep it to himself: And for this reason, that there was no felonious intention, nor even so much as a *trespass* in the first occupying of the thing, which was lying vacant, and out of the power of the owner, who knew not where it was, and might lawfully be taken into the possession of the finder, for the sake of custody, or till offer of a reward ². This is so much the case, that though caught in

¹ The like judgment was given in England, in the case of John Waite, cashier to the Bank of England, who had abstracted and sold six East India bonds, the property of the Bank, and entrusted to his keeping. At the Old Bailey, before Mr Baron Reynolds, in February 1743. But by that judgment the offence does not seem to have been considered as the ground of a criminal charge of any sort, but only of a civil action. See Leach's Cases in Crown Law; No. 13.

² The contrary seems to have been found with respect to the coachman, in the English case of William Wynne; but on principles which probably would not be followed in our practice. Leach's Cases, No. 168.

in the very act of occupying the thing, he could not have been challenged, nor made liable to any censure. In this, therefore, as in some former instances, the wrong does not enter deep into the case, but consists in the failure of social duty, as to the restitution of the thing, or the giving of the due notices, whereby the owner, or he who hath right, may come to the knowledge of his property.

THEFT AND
STOUTHBRIEF.

It is no doubt true, that in some of our antient treatises, the concealer of a waif is ordered to be dealt with as a thief, and the *occultatio thesauri inventi* is spoken of as not only a theft, but a sort of treason. But it is obvious that these views, (which at any rate no longer govern our practice, and I know not if they ever did), were not drawn from the nature of the fact, but are strained and artificial notions, which were taken up for the more effectual protection of the Crown's interest, in these articles so peculiarly exposed to invasion, and hardly possible to be thoroughly defended.

Concealment of
Treasure.

In all situations of this kind, it is however essential, that the thing, at the time of taking it, have in a full and proper sense been out of the owner's possession. For, if I see my neighbour's sheep break through our common fence, and mingle with my flock, and I instantly drive off the flock to another quarter of the country, and efface my neighbour's mark, this seems to be nothing less than theft. Though in my field for the instant, the sheep are not in any proper sense out of the possession of my neighbour: It is rather to be held that I for the first time take them out of it, when I drive

In a list of cases tried before the Magistrates of Edinburgh, and subjoined to the information against Ludovick Campbell, in January 1730, I find the trial of Bailie Roger Hogg, for hidden treasure found in an old land in the town, 16th April 1724. This is the only vestige I have found of any charge of this sort.

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drive off the flock, so as to remove them out of his probable recovery. It might be more difficult, if the stray sheep should remain for many days among mine unobserved, and be there tended in my pastures along with mine, because I should here be in possession, not only without any wrong on my part, but even without my own knowledge.

THUS far in illustration of that side of the question which is favourable to the pannel. It is no less necessary to guard our rule on the other part, and to point out those situations, in which the wrong will, in the estimation of law, amount to theft, notwithstanding circumstances, which at first might seem to lead to a milder construction.

Is Theft, though
thing exposed to
the Thief.

1. It is not to be understood that the offence ceases to be theft, because the owner has exposed the thing to a risk of being stolen, and in this sense has put it under the offender's power; for this may very well happen, and yet the offender may not, in any proper sense, have been made keeper of the thing, even for the time; not to mention that it were very dangerous to put property out of the protection of the law in situations of this sort, which are frequent and unavoidable in the daily intercourse and business of life. A shopkeeper produces his goods to one who enquires for them, as if to buy, and the pretended customer runs off with them, as soon as they are put into his hands; or a person gallops off with a horse, which he has got upon in public market, under the pretence of trying his paces; or under pretence of giving change for a bank-note to one who asks for it in public market, a cheat gets the note into his hand, and instantly runs off. It seems to be very plain, that in any of these cases, the crime is theft. For in no one of them does the owner repose any voluntary or proper trust in the stranger, or mean to venture his property for any time,

time, how short soever, out of his own immediate care and personal keeping; in which it still continues to be, though put into the hand of another, under the owner's eye. And as little doubt will there be of his case, who pockets the spoons at an ordinary where he dines, or takes off and packs up the sheets from the bed of a chamber where he has lain; for in either case he has only the special use of that thing: The possession, the care and charge of it, are with the master of the house, under whose keeping and protection it has constantly remained.

THEFT AND
STOUTHRIEF.

2. It seems likewise to be the better opinion, that the same shall hold of those very frequent and ordinary situations, where, though in some sense a trust is given, that is as far as relates to the care and custody of the thing for particular uses, yet the constructive possession of it in the opinion of law is with the owner, and not with the immediate keeper, who only holds it as a hand, in the name, and for behoof, of his employer. Such is the case of the butler stealing the plate, or the groom stealing the horses, or the shepherd the sheep, which are entrusted to his keeping. The servant has not in any of these cases any sort of property or interest in the thing, or any power of disposal or administration of it, (as a factor or overseer hath), but only the naked custody and detention of it in a state of accessibility to the master, who can arrange the keeping of it for his own uses in no other way, and out of which state, thus natural to the thing, when the servant removes it, it is therefore a proper *taking* from the possession of the master; that is, a theft. By the master's commitment of it to the servant, there was no change of lawful possession, no alteration nor decrease of his full command of the thing, in so much.

Custodiar of a
Thing, can he
steal it.

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much that it could not be arrested in the servant's hands for the master's debt; and as in case of its being abstracted from the servant by any stranger, it would nevertheless be held to be taken out of the master's possession, who alone could sue for recovery of it, so must the same be held when the servant himself removes it, or is art and part with strangers, who do so.

May 31. June 1.
Aug. 10. 1608.

THE contrary doctrine was strenuously urged in the case of Margaret Heartside, an attendant of the Queen, who was charged with the theft of sundry jewels, her Majesty's property, and of considerable value, of which she had the keeping. But the Court repelled her defences, and sent the libel as it stood, bearing a charge of theft only, to an assize¹. It is true, that though unsuccessful with the Court, this plea prevailed with the jury, who acquitted her of the theft, and found her only guilty "of the unlawful and undutiful subtracting and detaining:" But in matter of law the opinion of the Court is more to be regarded. She had sentence, as was not unusual at that time, under authority of a letter from the King, which indirectly blames the assize for acquitting of the theft, and bears, that his Majesty "accounts her fact as infamous as if it had been done by direct stealth," and therefore banishes her to the isles of Orkney, for her lifetime. It appears, however, that she was recalled in 1619, reponed against the sentence of infamy, and reinstated in her place.

Case of Servant
or Clerk, steal-
ing Things sent
by him.

3. IF this doctrine be just of such situations as these, in which the offender has the constant care and charge of the particular thing which he has carried off, much more must the

¹ "The justice, with the advice of his assessors, finds the lybel and dittay relevant, notwithstanding of the haill exceptions proponit be the pannell; quairupon my Lord Advocate askit instruments."

the same hold good, if he has the thing only by an occasional employment, or on a special and instant errand; as in the case of a porter at the post-office, who receives a letter, with money inclosed, to be delivered according to the address; or the case of a banker's clerk, who is sent with a sum of money, to be instantly paid at such a house; or in the case of any tradesman's servant, who is sent with an article, to be delivered to a customer. It seems to be at least equally true in all these situations, as in any of the former, that the present holder of the thing has no manner of interest in it, and is to be regarded only as the instrument of his employer, in whose possession the article remains until such time as it be delivered to the use whereto he hath sent it, in like manner as if it were only sent from one apartment of the office or counting house to another. More especially, in the first of these cases, the porter hath no sort of concern with the *money*, but a charge only over the *letter*, duly to deliver it. And it is no less clear with respect to the banker's clerk, that his master may countermand him, and alter the destination of the money at pleasure, as long as it is in the hands of the clerk.

OUR practice, accordingly, though it cannot be said to have attained to the same certainty in this department as that of England, where such questions have been settled by frequent trial¹, seems, however, as far as it has gone, to

K

have

¹ In the case of Thomas Hassell, a sorter of letters at the Post-office, tried at the Old Bailey on the 16th October 1730, before Lord Chief-Justice Raymond, and other Judges, the Court were unanimously of opinion, that it was felony without benefit of clergy, for him to steal money out of a letter entrusted to him in his office. Leach's Cases, No. 1.

At the Old Bailey, in July session 1774, Timothy Skutt, a sorter of letters at the Post-office, was convicted of larceny at common law, for stealing money out of two letters, which had come into his hands as sorter. *Idem*, No. 61.

In

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Nov. 27. and
Dec. 11. 1704.

July 6. 1781.

Sept. 25. 1780.

have proceeded upon these views. Thus libel was sustained for theft against James Shand, a taylor's workman, for running off from his master's house with a suit of clothes, which had been entrusted to his master, to make. In the case also of William Fairbairn, who was prosecuted as a thief in an inferior court, for abstracting from the corn which he was employed to thresh in the owner's barn, no exception was taken to the form of charge, though advocacy of the process was tried upon various other grounds in law, all of which were strenuously urged¹. The bill was refused on the 26th July 1787. Farther, which is more express, in the case of Daniel Mackay, assistant-porter at the Post-office, and of Adam Johnston, post-master of Moffat, in both of which the libel was for stealing money out of letters entrusted to them in these capacities, and was laid at common law, as well as upon a statute in that behalf, an indiscriminate

In the case of the King against Paradise, tried before Mr Justice Gould at the assizes for Salisbury, that Judge was of opinion, that a banker's clerk who ran off with bills to the amount of L. 1500, which his master had given him to enclose and dispatch by post, was guilty of larceny. The twelve Judges, being afterwards consulted, were of the same opinion. *Idem*, p. 420.

At the Old Bailey, in May 1782, William Bais was convicted of larceny, having opened a package, with which his master, a gauze weaver, had sent him to a customer. The twelve Judges being consulted, were all of opinion that the conviction was right. *Idem*, No. 115.

¹ This was the outset of the libel, "Where, by all law both human and divine, the stealing or taking away any person's property without the knowledge or consent of the owners, is a crime of a heinous nature, and severely punishable, more especially when committed in breach of trust and confidence."

Libel was raised for theft against William Watt, 16th February 1779, clerk in a banking house, for running off with bills and money, given him by the cashier for a certain purpose. But the prisoner having consented to be banished, the case never came to trial.

minate relevancy was found upon the charge as laid; and this after debate in the last case, on the objection that the offence, at common law, could not amount to more than breach of trust. The pannels were convicted, and had sentence of death. Likewise, Peter Mathieson, an engraver's apprentice, for stealing seals and gravers tools from his master, was transported for fourteen years, (the prosecutor, on his confession, having restricted the libel to an arbitrary pain), upon a libel which bore the charge of theft, aggravated by the pannel's state, as an apprentice.

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HAVING said so much of these cases, I need hardly remark, that the pannel has no plea in those far less favourable situations, where there has not been any commitment of the particular thing to him, but only an advantage or opportunity to steal given him, by reason of his station. As if a servant open his master's repositories with the keys which he has found in the house, mislaid, or if being sent by his master with the key to fetch a particular thing from a locked place, he take and secrete some other article; or if the groom steal plate from the butler's pantry, or the butler take a horse from the stable.

A MORE difficult set of cases than any of the above, and concerning which still less information is to be obtained from the records of our Criminal Court, are those in which the prisoner obtains the thing by means of a trick and false pretence, and upon some inferior title to that of property, and has no other purpose, at the time of obtaining it, but to cheat the owner, and turn the thing to his own profit. An example of this may be, If a person under a false name, and a false pretence of business, shall hire a horse to

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ride to a certain place, and return the same day; instead of which he instantly rides the horse as hard as he can go, to a great distance, and in a different direction, and there sells him, and pockets the price. Or if a person goes from door to door, asking employment as a bleacher, and getting linen to be bleached and returned, and shewing a false letter of recommendation, when in truth he is not, nor ever was a person of that trade; and having got the linen, he instantly packs it up, and flies. Is the offender here guilty of theft, or only of fraud?

It is to be observed of such situations, that they differ in several respects from those, seemingly analogous cases, which were formerly considered. First, the thing is not obtained upon a contract of sale, or other habile title for the conveyance of *property*, but upon a lower and limited title, under which, if it were even fair and unexceptionable, the holder would not have any right to dispose of the thing, nor to turn the value of it into his own pocket. So far from it, that even on this supposition, any stranger who should *bona fide* buy, pay for and receive this thing from the holder, would not thereby make it his own, but would be liable, in like manner as his author, to the owner's real action for recovery of his property. When the holder assumes any such power of dominion, it is therefore an unwarrantable and absolutely vicious conversion of the thing to his own use, wherein he has not the colour of a title, and is in truth guilty of a double wrong, having gained the very custody of the thing by a trick, and arrogating the disposal to himself, without the appearance even of the owner's will. Whereas in the case of a swindling purchase upon credit, the holder has obtained such a title, by which the property of the thing in the mean time passeth, and in using, selling, or even destroying the thing,

thing, he does no more than exercise the powers appendant to that title; so that the wrong in this case does not lie in the after conversion of the commodity to his own uses, without consent of the last owner, but in the false inducements by which that consent was gained.

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AGAIN; in this, the situation is different from that of a swindling purchase, that the feller has the means of absolutely securing his interest if he please. He may either sell for credit or for ready money, and if he sell for credit, it is out of a voluntary trust, which he reposes in his customer, whereby he hath the less reason of complaint if he shall be deceived, and can only expect those remedies which are suitable to a breach of trust. But, in the cases which are now in hand, the owner hath no such choice nor means of absolute security, but must necessarily deal as he has done. This risk of the property which is parted with in hire, or to be worked upon, or the like, is concomitant of the very nature of these useful and necessary contracts, and cannot be separated from them; so that the more necessary it is, (and this consideration never is indifferent in criminal matters), that a sufficient protection be provided in the pains which the law denounces against transgressors.

Case of Thing
hired with intent
to take away.

FARTHER; there is this very material, and withal obvious distinction, between the situations of hiring and the like, now and formerly imagined, that the felonious purpose is now supposed to be coeval with the very act of receiving the thing, and to be that which alone has suggested to the pannel to ask it of the owner; whereas we had formerly put the case thus, that the thing was at first obtained upon a just and *bona fide* contract of hiring and so forth, and with a true intention on the part of the pannel, as at that time, to restore it according

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according to promise. By the delivery, therefore, made in pursuance of such contract, the owner's lawful possession ceased and determined, and the abuse of the trust afterwards, though criminal, cannot, however, amount to theft in the receiver of the thing, since before the conception of any wrong purpose, the thing had already passed into his power and entire possession, by a lawful taking. On the contrary, with respect to the present case, in which there is truly no contract or *consensus in idem placitum* between the parties at all, but a purpose of letting to hire in the one party, and a purpose to appropriate without payment, or an *animus furandi* in the other, which exists at the moment of getting the thing, and is the one original motive of the whole transaction, the just and natural construction rather seems to be, that the owner's lawful possession remains unaltered notwithstanding this delivery, thus proceeding on the receiver's felonious purpose; and that his conversion of the thing to his own uses is therefore to be deemed a theft or *tortious taking* from the lawful possession of the owner, in like manner as in the case of a servant, who runs off with his master's goods. This result too is not more agreeable to principles of law, than to the natural feeling which one has with respect to the degree of the offence; for certainly on such an occasion the very same villany is passing in the offender's thoughts as in those of the thief, and the assurance, depravity, and deliberate contrivance of such a device, by which the owner is made the instrument of his own injury, is nowise inferior to that of an abstraction without his knowledge.

YET I shall not affirm that this is the law of Scotland: Because I have found but one case, in which this important question can be said to have been the subject of trial; I mean the case of John Marshall, tried at Dumfries, before
Lord

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Lord Hailes on the 26th April 1792. This man had hired a horse at Sanquhar, to ride to Leadhills, a distance of about ten miles, and return in the course of the same day. Instead of which he rode directly to Edinburgh as fast as the horse could go, and there sold it for his own behoof. The charge in the libel was alternative, for fraud and cheating, as well as theft. But the Judge delivered his opinion, that upon the fact as related in the libel, the offence was theft; and the prosecutor in consequence, wishing to avoid a capital conviction, found it necessary to restrict the libel to an arbitrary pain. The man was convicted, and adjudged to be transported for seven years.

Thus much of the taking which is essential to the crime of theft. Upon the whole of which enquiry, before I entirely dismiss it, it is proper to remark, that our practice has not yet attained to sufficient maturity, and that a great part of what has been advanced, is not to be considered as the result of our adjudged cases, and other authorities, which are few in number, but rather as an exposition of doctrines which seem to be reasonable in themselves, and are in some particulars recommended by the practice of England; which, though it is not of any authority with us as law, may,

¹ Judgment was given to that effect in these cases; John Tunnard, October 1729; George Charlewood, February 1786; John Pears, September 1779; all of them cases of a horse feloniously hired and sold, and upon the last of which, the opinion of the twelve Judges was taken, and was unanimous. Also in the case of Major Sempil, July 1786, for hiring and selling a carriage; and in that of John Wilkins, April 1789; and John Patch, February 1782; both of them cases of false device for getting hold of property, as upon some limited title; the offence was found to be felony, upon the general notion, that the owner could not be divested of his lawful possession by a tortious taking. See Leach's Cases in Crown Law, p. 191; Case, 166; Case, 100; Case, 172; Case, 210; Case, 110.

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may, however, as far as it is grounded in just and natural principles, meet with regard in the decision of such matters, as our own custom or analogy of practice hath not settled.

No Theft without carrying away.

II. THERE must not only be a taking of the thing, but a carrying away. For it seems to be in the nature of this offence, (and any greater latitude of construction would lead to controversy without end), that the thing have been brought into a situation, in which it was less under the owner's power and command than before. In general it is the meaning of the rule, that the thing must be removed from the place and state of keeping in which it had been, and that without such an alteration, nothing done by the pannel, how decisive soever of his felonious purpose, will amount to theft, but to an attempt or misdemeanour only, which may be greater or less, according to the circumstances of the fact. A boy has his hand in my pocket, and has got hold of my purse; but there I seize his hand, so that the purse is never withdrawn from my pocket: This seems not to be theft. Neither is it theft, if a vagabond passing make a snatch at linen on the hedge, and it is held against him by the thorns; or having got into a waggon with intent to steal, if he raise a package up, and set it on its end, but without removing it from the place of the waggon where it had lain, and is there caught, when about to cut the cords¹.

It

¹ This was found by the twelve Judges of England, to be no sufficient asportation, p. 204. Leach's Cases.

A difficulty of this sort had been found in drawing the libel against Andrew Macewan, 10th August 1774. It related that two persons had entered a house in the day time, and made their way to a room where linens were lying on a bed. One of them had handed a shirt to his associate, and had laid hold of others, which, upon interruption, he was seen to throw back upon the bed; so that only
one

It is not however by any means to be understood, that there is no theft, unless the thing be carried clear away, out of the sight or knowledge of the owner, so that he knows not where to find it. Though the thief be seen in the very act of taking the thing, and be instantly and closely pursued, so that the owner has all along been in the near prospect of recovering his property, the offence must nevertheless be theft, for this very reason, that he has had the thing to pursue for and recover. Thus, in the case of Smith and Forrester, this charge, among others, was found relevant, that they had laid hold of poultry in a close or courtyard, but being discovered, threw down the same, and fled. In that of Samuel Riccards, it was in like manner found a good charge of robbery, (which is only a mode of theft in the larger sense of the word), that he had run off with a woman's plaid from her shoulders, which, on her outcry, and a hot pursuit, he threw from him in the fields, where it was instantly taken up by those who were upon his footsteps.

THEFT AND
STOUTHRIEF.
What a sufficient
carrying away.

Dec. 15. 1686.

Feb. 27. and
June 19, 20. 27.
1710.

ALTHOUGH there be but a very slight removal in respect of place, it will also in every instance be a theft, if the thing is thereby lost to the owner, so that he has to seek

L

for

one was *taken*, and that one neither concealed nor carried out of the room. The charge was therefore laid alternatively as for theft, or the entering of the houses of the lieges, *with intention* to steal, or the felonious taking of a shirt or shirts, or other goods their property. The pannel was transported on his own petition.

“ And ye and your accomplices entered the close of William Simington, then and there laid hands upon his goose, to robb and steal the same, but by reason of their noise and jangling, the people and servants having wakened, and come out in their shirts, they fand you in the fang, whereby you was forced to let the goose fall, and flee for your safety, but you the said Finlay Smith was taken.” This is the narrative of the libel.

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for and knows not where to find it, or in case of missing it, would be under that necessity: For, how short soever the time that this situation endures, it is quite a new and distinct situation of the property and person, from that which they were in before. Thus it will be theft in a servant to take his master's purse from the table, or to unhook his watch from the bed, though he be caught with it before he leave the room, if it be found concealed in his clothes, or about his person, in such a manner as proves his felonious intention. As it would also be for any guest in an inn or tavern, to secret any piece of plate, linen, or the like, belonging to the house, in his chest, with intent to carry it away.

What a sufficient
carrying away.

THERE seems to be as little doubt of this general direction, that it is always theft, if the thing is taken out of its natural and proper place of keeping; not the place where it accidentally happens to be, but that where for security it had been put. Thus the crime is complete, as soon as the horse is carried out of the stable, or the cattle out of the inclosure, though the thief be stopped in the stable-yard in the one case, or in the next field, being part of the same farm, in the other. Accordingly, in the interlocutor of relevancy in the case of William Baillie, the Court "*separatim*" find, That the goods libelled being stolen out of the said house or waulk-mill, and their being found red hand in the possession of the said pannel, *coming out of the said house*, relevant to infer the pain of death."

Aug. 7. 1714.

Feb. 5. 1782.

IN like manner, Thomas Gordon had sentence of death for sheep-stealing, on proof to this effect, that he had lifted two sheep over the wall of the field, where they had been at pasture, and had slaughtered and flead them behind the wall, and was there taken, before removal of his booty.

The

The slaughter was indeed a strong circumstance, taken along with the others in the case; but if it had taken place within the field, would not of itself have grounded the charge of theft, since it might have been done out of malice, and without any purpose to carry off the carcase.

For the same reason which makes a removal from the *tenement* sufficient in these cases, it is no less sufficient with respect to any thing which has a peculiar and safe place of keeping within the house, if it be once taken from thence, with intent to carry it away. Under this rule my servant is guilty of theft, when he takes money out of my bureau, and the guest in an inn, when he forces the lock of any repository in his chamber, and takes out the contents, or one who has entered a house, when he breaks up a chest, cupboard, or the like, and lays down the goods upon the floor¹, to be afterwards packed up and carried away. There is a strong instance of this in the case of Alexander Snaile, who had sentence of death upon a libel and proof to this effect, that he had entered a house, by means of a false key, upon a Sunday, during divine service, and that having opened a chest, by means of the key which he found in the lock, he abstracted one article of very trifling value, with which he was taken in that very chamber, by the people of the house, returning from church².

Dec. 19. 1698.

L. 2

THE

¹ This was found to be felony in the case of Clement Simpson, at the Lent assizes for Cambridge, 16. Car. II. The opinion of all the Judges was taken on the case. Leach's Cases, p. 266.

² Verdict, "Find Alexander Snaile, pannell, by his own confession, as also by the depositions of witnesses, guilty of opening the door of Mrs Douglas, her house, upon the Sabbath-day, the time of divine service, with a false key, and entering the said house, and taking out of a chest some butter; and that the
" keys

CHAP. II.

What a sufficient
carrying away.

THE same principle equally applies to the stealing of such things are kept in a certain manner about the person; whereby it is theft if the purse be taken out of the pocket, or the watch drawn from the fob, or the ear-ring torn from the ear¹. And in general it seems to be true, that if the state of fixture in which the thing is by nature be altered, or if the peculiar provisions, whatsoever, which the owner has made for the safe-keeping of the thing, be once overcome, this, joined with any the least removal of it in respect of place, consummates the guilt. Hence it may seem that there is ground for the charge, if wool be plucked from the sheep, or fruit from the tree, or if a strong chest, which is fastened to the floor, be unscrewed, and lifted ever so little out of its place; or if a piece of cloth in a bleachfield is unpinned from the ground, and rolled into a bale, which the thief has taken up under his arm; or if he cut a web out of the loom and fold it, or take a person's breeches with his money from under

" keys produced in Court, and mentioned in his dittay, with the crooked irons,
" was then taken off him; as also a chissell, which was found, which he acknow-
" ledged to be his, *when he was taken prisoner in the said house.*"

¹ A singular case of this sort was tried at the Old Bailey in May 1784. James Lapier had taken his stand at the door of the Opera-house, and seeing a lady, Mrs Hobart, passing to her carriage, he made a violent attempt to pull away a valuable ear-ring from her ear. The ear was torn through, and the ear-ring completely separated from it, and the lady cried out that the man had got it; and he was taken. On going home, however, and at undressing, the ear-ring was found entangled in the curls of her hair. Nevertheless, as it had been violently forced from its due state of fastening to the person, and was for a time missing, the twelve Judges were of opinion, that his conviction of robbery was legal and good.—In like manner, at the Old Bailey, in February 1782, Henry Collet was convicted of larceny, having entered a waggon, and removed a parcel from the fore part of the waggon to the tail of it, where he was stopped, and threw back the parcel to the middle part of the waggon. Leach's Cases, No. 139. No. 108.

under his pillow, as he sleeps, and be making off with them out of the room. And even with respect to articles of that nature, for which no such peculiar provision has been made, any removal will be sufficient, that thoroughly alters the situation in which the thing was left or happened to be, and is a plain step in the conveyance of it out of the owner's power; as if any loose article in a house is carried down from a higher floor to a lower, or if a horse is taken in an open common, and is haltered and mounted, and ridden away from among the other cattle.

THEFT AND
STOUTHRIEF.

III. THE taking and carrying away must be with a felonious purpose; in the knowledge that the thing belongs to a neighbour, and with intent to deprive him of his property. Hence, on the one hand, it is not theft, to take away the property of another, though in the knowledge that it is so, if the takers object is only irregular and improper, and not to make the thing his own. It is an example of this, that a servant rides his master's horse under night, upon his own errand; or that a person finding his neighbour's plough lying in the field, openly uses it to till his own lands adjacent; or that he drives his neighbour's cattle into his own field under night, in order to pound them, upon pretence of trespass. On the other hand, neither will it be theft, though the taker mean to dispose of the thing as his own, if he take it in the belief, no matter though erroneous, if serious, and withal excusable, that the thing is his own; as may happen in many cases of disputed sale, legal diligence, succession, and other modes of conveyance. If John carry off the goods of James by pounding, be the diligence ever so irregular, nay, though John's proceedings be even insidious and oppressive, still the taking in this form can never

No Theft without felonious Intent.

CHAP. II.

Sept. 9. 1636.
Feb. 8. 1637.

never amount to theft or stouthrief, or other capital denomination of crime, but only to a spuilzie or oppression, which may be punishable at the discretion of the Court. Hence, of the many overstrained libels of this sort, to which the proud and contentious spirit of the inhabitants of Scotland formerly gave occasion, not one seems to have been brought to a favourable issue, nor even to have had a clear relevancy of capital pain pronounced on it. The ordinary course in such cases was to continue the diet, till the civil interest and regularity of the conveyance should be discussed in the proper court¹. In the case of Graham of Reidnock, prosecuted by the Laird of Buchanan, for breaking into his house, and carrying off certain writings and title-deeds, which appears to have been done upon mandate from the old Laird of Buchanan, who conceived that he had right to these deeds, "The Justices find the dittay relevant to
" be put to the knowledge of an assize, as ane crime and
" wrong of making up of the doors, and abstracting of the
" evidents lybelled, nawayis to infer the pain and punish-
" ment of theft or stouthrief, but to be punished *pæna ar-*
" *bitraria*, as ane crime and wrong in the awin kind."

A CONTROVERSY had subsisted between Trotter of Mortonhall and Rigg of Morton, respecting the property of certain parcels of ground. Rigg had cast the turf upon these plots, and was proceeding to lay it on his bowling-green, in which operation he was violently disturbed by a *posse* under the orders of Trotter. This incident gave rise to mutual prosecutions;

¹ This was the course taken in the case of James Adamson, 13th June 1677, accused of robbery, in the taking away of nine oxen; and who defended himself on the ground of *lawfully poinded*. In the case of Gilbert Stark and others, 30th November 1675, who pled the same defence against a charge of stouthrief, robbery and oppression, the Court assilzied, on production of the diligence.

secutions; against Rigg for theft and robbery, in cutting and carrying off the turf from Trotter's lands; against Trotter for robbery, oppression, haime-sucken, &c. in destroying Rigg's turf and bowling-green, tearing up the new turf in the green, (or *green specificate*, as it is called), and troubling and beating his servants. The former was found not relevant to infer any criminal conclusion; the other was sustained, as for a riotous molestation and outrage only, to infer arbitrary pain, damages and expences.

THEFT AND
STOUTHRIEF.

Nov. 8. and 15.
1714.

Much a-kin to this, were the mutual prosecutions for robbery, theft and stouthrief, between Sir William and Ludovick Gordon. Which were upon no higher ground than this, that having met to settle accounts, they had quarrelled upon the matter, and in a sort of scuffle, had each laid hold of the writings belonging to the other. Both parties found it necessary to depart from these high conclusions; and the jury found neither of the libels proven. Many examples more of the same complection might be given.

Feb. 2. and 9.
1713.

It has been said, and is fit to be remarked, that it is necessary the pannel be excusable for believing that the thing which he has taken is his own. For as to that sort of belief, if such it may be called, which is directly in the face of law, and only comes of the violent passions of the man, or his blind prejudices in his own favour, it is what the Judge can have no consideration of, nor any of the lieges be allowed to entertain. A smuggler, therefore, if he break into the Custom-house, and take away goods, which have been seized from him and condemned, is as much guilty of theft and house-breaking, as if he broke into the house and took away the goods of his neighbour.

IV. It is said to be another qualification of the taking and carrying away, that it is for the sake of lucre and profit.

Must the taking
be for lucre.

2

But.

CHAP. II.

But this article will require to be guarded and explained. It is true, in the sense already explained, *viz.* that the thing must be taken away with the purpose to detain it from the owner. It is also true in this other sense, that libel will not lie for theft, if, out of malice to the owner, the property is destroyed in the place where it is seized, without being removed; which happens when a man's cattle are slaughtered and left upon the spot in the field, or when a mob enter a man's house, and break and deface his effects, without carrying any article away. But it may require to be considered, in the case of the property being once removed into the full possession of the offender, whether it alters the description of the offence, that instead of being used or turned to profit, the thing is afterwards destroyed, and that this indulgence of spite was even the first inducement to take the thing away. In its own nature, the crime of theft seems to be complete by the removal, and the thorough alteration of the state of command over the thing, if this be made with the purpose of never restoring it to the owner. Be the offender's object what it may, he is actually *locupletior*, and the owner poorer, *eo ipso*, that he has the thing under his power, to dispose of as he pleases: And if he coveted that power for the sake of revenge, this neither hinders the taking away to be such, nor even in any proper sense to be a taking for the sake of lucre; since this gratification of his evil passions, is to him a lucre and gain. He still has sought an advantage to himself, and sought it by removing his neighbour's property out of the possession of his neighbour into his own. Having secured this advantage, he may either persist in his original purpose of mischief, or change it for one of use and profit, if he shall be so inclined: He has now the very same discretion in that respect by his possession, which the owner formerly

formerly enjoyed by the same means. In case, therefore, (if such a thing should happen), of a herd of cattle being driven from the owner's lands to those of his enemy at a distance, and only slaughtered when there settled in the custody of his enemy, the charge of theft may seem to lie; for it would have lain if he had been pursued and taken on his way; and it is hardly to be thought that this can be altered by any after event. The criterion, therefore, in this question, rather lies in the want of removal of the thing.

THEFT AND
STOUTHRIEF.

BUT however this may be, it is certain, that in the ordinary case, the *animus lucri* is to be presumed from the act itself of taking the thing away. If the offender knew at the time what it was he took, he was actuated by the desire of that thing, and if he knew it not, as happens in pocket-picking, and in stealing the mail, and if the thing prove to be such as can be of no use to him, all that can be said is, that the man has been deceived in his expectations; for take it he did in the hope of profit, and in the belief that it was worth having, and making venture of his person for. No matter then what afterwards becomes of the thing, or with what view he keep it, nay, though he do not keep it at all, but destroy or throw it away, or even fall on some means of reconveying it to the owner, the guilt still abideth with him. The profit only, and not the profligacy of the enterprise is thereby lessened, which last is determined by that which is passing in the mind of the adventurer at the time of taking, and not by those considerations, of fear, repentance, or prudence, which may afterwards come to affect him.

Animus Lucri
explained.

M

IT

CHAP. II.

Animus Lucri
explained.

It is also to be understood, that if the thing be kept by the taker, it matters not what the motive of the keeping is, whether merely to hoard, or with a view to consume the thing, or what other advantage, real or conceived. Every object is *lucre* in the estimation of law, which tempts a person to desire the *keeping* and possession of that which is another's; though the thing is not of that nature to yield, or be convertible to, pecuniary profit. If a criminal purloin from the Sheriff-clerk or Procurator-fiscal, the documents and evidences either of his own guilt or that of an associate, surely this is to him a real lucre, and relatively to the nature and use of the thing taken, he is as much actuated by a selfish and irregular desire of gain, as he who steals a bag of money. And probably it will be admitted, with respect to a connoisseur, who should steal pictures or medals for the pleasure of admiring them, or an antiquarian, who should steal rare books or manuscripts for his instruction, that neither of them would have a sound defence in a court of justice. We shall afterwards see, that we accordingly have precedents of libel sustained for the stealing of a child; though the *ordinary* incitement to such a crime, must either be love conceived to the child, or more probably hatred to its relations. In short, as various as the pleasures are which a man may have in possessing his own, so various are the sorts of lucre, which the law will hold sufficient in this question, if on account of them one should covet that which is another's.

Must the taking
be clandestine.

V. ACCORDING to some authorities, it ought also to be added to the description of the crime, that the taking and carrying away is secret and clandestine. And this may be true, if we understand a clandestine taking as contradistinguished

stinguished only to a taking by main force, or by putting in fear. But in any looser and more general sense, such as would exclude all taking by surprise, or of a sudden; as if a person snatch the hat from a man's head, or his watch out of his hand, as he is carelessly holding it, or if he dart into a shop and run off with goods from the counter in presence of the owner; it does not seem to be a proper part of the description of the crime, which in all these instances seems rather to be theft than any thing else. For neither is there any application here to the will of the owner, to over-awe him, nor any compulsion by an overpowering force, which seem to be the characters of robbery, but a taking in such a way, which equally sets aside the owner's will in the matter, as the most clandestine abstraction; since the thing is gone, before he can use any means to detain it. If, however, any sort of struggle ensues on the attempt, and the purpose is only accomplished by violence or terror, the case becomes then a case of robbery, notwithstanding the first intention to take by surprise.

THEFT AND
STOUTHRIEF.

VI. WE are now come to the last article in the description of this crime; which is that the thing taken be the property of another: For I see no authority in our practice to persuade me, that a person can in any case be guilty of theft, though he may of some inferior wrong, by irregularly taking that which is his own. It is not, however, any hinderance of the charge of theft, that the property of the thing taken is uncertain or unknown, such as the goods of a deceased, goods passing on commission, or a waif or stray that is stolen from the finder. Indeed, a certain latitude in this respect is indispensable to justice, in the extended state of commerce and manifold transaction

Thing taken
must be *Res*
aliena.

CHAP. II.

among men, which offers so many situations of this ambiguous character, but in which there is nevertheless no reason, why the thing should be out of the ordinary protection of the law. Hence, though any libel at a private instance must set forth the pursuer's interest in the thing, and though in all cases where it can conveniently be done, the property is in use to be set forth, for the pannel's full information of the nature of the charge against him, yet in indictment for the public interest, whensoever there is any reason for it, it will be sufficient that the charge is made in such a manner, as shows that the thing did not belong to the pannel, neither really nor by pretension, and that neither was it lying unoccupied, but in a state of lawful possession, for behoof of the person who then had, or should afterwards acquire, a right to it. Nor is there any sort of hardship here on the pannel, who has it equally in his power under this, as any other form of charge, to prove that the things are his own property, or that of others, by whose authority he took them; a proof which it always lies on him the pannel to bring forward.

Mar. 2. 1736.

THE charge against Wilson, Hall and Robertson was, that they had carried off "bank-notes in a pocket-book belonging to the said James Stark, and gold and money in *his possession*, to the value of L. 200 Sterling, less or more¹."

Feb. 5. 1787.

Janet Johnston was indicted for stealing certain articles, "the property of James Marshall, *or others of his family*." And

Aug. 9. 1770.

Macdonald and Jamieson for breaking into the shop of Alexander Macdougall, and stealing goods from thence, "being the property of Alexander Macdougall, *or of some other person, to the prosecutor unknown*." The charge was sustained in

¹ The person robbed in this case was collector of excise at Kirkcaldy, and the money taken from him was chiefly public money, the produce of a collection, upon which he had been employed.

in all these instances, and in the last after exception taken to it by the pannel.

THEFT AND
STOUTHRIEF.

It is almost unnecessary to remark, that the charge of theft is competent, without regard to the quality of the owner, whether a private person, or his Majesty, a corporation, a private society, a parish, or what else, or though the case should be such, in which it is difficult to fix the precise description of the owner, or the nature of the immediate interest in the thing. The money taken in Smith and Brodie's case, and in that of Wilson and Hall, was part of the royal revenue. On the 6th of December 1556, Adam Sinclair and Henry Elderlous had sentence of death for breaking into the church of Forres, and stealing money, chalices, and church-ornaments. On 21st May 1602, William Norvall, school-master of Cockpen, was banished for stealing from the session-house, the poors box of that parish, containing L. 8 of the poors money. And in the spring circuit 1750, at Aberdeen, William Martin had sentence of death for the same crime, having broken into a church, and stolen L. 11 of the poors money. We are not subject, in such cases, to the same difficulties, which seem to embarrass the English practice in stating the property, and which, in some instances, have constrained them to feign a property, where in strictness there is none, (as in the case of a shroud taken out of the grave, which is feigned to be the property of the relations of the deceased), but will more reasonably be content with such a description of the thing, as makes the possession or administration of it clear, and excludes all title in the pannel to take it away.

Res universitatis
may be stolen.

Aug. 27. 1788.

VII. THESE seem to be the principal circumstances of the description of the crime of theft. Which having once been committed

Theft not pur-
ged by restoring
thing or value.

CHAP. II.

Feb. 3. 1663.

Dec. 2. and 3.
1669.

April 5. 1686.

July 6. 1781.

committed by a proper taking and carrying away, cannot afterwards be undone in any course of conduct, not even by early and voluntary restitution of the thing stolen, and much less by payment of the value, or other atonement in money. For what the law chiefly considers in this matter, is not so much the damage to the individual, as the violation of the order of civil society, by dishonesty prevailing over right, and the danger of seduction, by the spectacle of this as a practicable thing. Witness, in proof of this, the case of John Watson, who had sentence of death for stealing forty sheep, notwithstanding his allegation, which does not seem to be disputed, that he had already refunded "the worth of" them to the owner. Witness also the case of Finlay Macgibbon, for the theft of six horses, and that of Grizel Somerville¹, in both of which, the defence of restitution of the things themselves, and in the former, along with "ten score merks for the skaith," was specially repelled. In the case too of Daniel Mackay, a letter-carrier, who had sentence of death for stealing L. 300 out of a letter, the whole sum but L. 15 had been returned through the Post-office, to the owner. Yet it may plausibly be maintained, though I do not know of any judgment to that effect, that the private party, who not only recovers his property, or the value of it, (for which he cannot be blamed), but has also taken theft-bute from the thief, shall not be allowed to prosecute; since, in the construction of law, he is in that case himself participant of the theft. But it is certain, that neither by this,

¹ Macgibbon's case. "The Justice repels the defence proponed for the pannell, and finds the dittay relevant, and ordains the same to pass," &c. He was accordingly convicted and executed.

Somerville's case. "Sustain the dittay as to the haill remanent articles of theft lybelled, relevant, *separatim*, to infer an arbitrary pain; and "repell the defence founded on restitution, and remitts."

this, nor any other measure of his, can he screen the criminal from punishment, or disappoint the course of public justice; of which he hath no disposal.

THEFT AND
STOUTHRIEF.

VIII. NEXT; of the things, whereof theft may be committed. In the law of England, theft is only of things personal, and not of things real, or things which appertain to, or favour of, the realty. Under this rule, there is no theft with them at common law, of nursery plants, nor of growing trees, nor of any of the growing fruits of the ground; nor of hedge-paling, nor of lead, iron, or other thing united to a house. As also the writings of any real estate, are not subject of this crime; neither are bonds, bills, or other choses in action; though for this a different reason is given. But to all these, (as we should esteem them) artificial distinctions, our practice has ever been a stranger, and recognises the theft of every inanimate thing, which can be severed from that, which either naturally, or by art, it is attached to, and be carried away. Thus, in the case of James Inglis, relevancy was found on the tearing of wool from sheep, and carrying it away¹. And in that of James Miln, accused of the several facts of stealing thorn grain, shearing grafs, and carrying it away, and pulling up growing pease, and carrying them away, all of which were charged under the name of theft only, the trial proceeded on that footing as to the whole articles; and the man was transported. It seems even to be the more probable opinion, according to the analogy of what is settled, that the separating and carrying away of part of the substance of the tenement itself, shall

Things whereof
Theft may be
committed.

Nov. 1. 1720.

Mar. 13. 1758.

¹ Long before this, sentence of death had passed upon James Gray, convicted of pulling wool from nine ewes, and stealing an ewe, and carrying off the wool which he had pulled; 17th March 1581. MS. Abf. Record, Adv. Libr.

CHAP. II.

shall be judged by the same rule. It is true, that injuries of this sort are ordinarily done in that open manner, and are accompanied with those circumstances, which bear evidence of a trespass only or molestation; but it seems to be only there that the distinction lies. For if one come in the night-time and work coal in his neighbour's pit, or stone in his quarry, or fuel in his moss, and carry it away and hide it, this seems to be just such an act as the cutting off the leaden spouts, or tearing up the iron spikes of his house, which is certainly theft.

Is committed of
Writings.

Mar. 30. Ap. 1.
& 3. & May 2.
1601.

May 20. 1614.

Aug. 13. 1669.
April 8 and
July 1. 1717.

WITH respect to writings, the law has been settled against the thief, by repeated judgments. As long ago as the 23d June 1599, Grizel Mathew had sentence of death, for stealing a coffer with writs and evidents. Also James and William Wood, and Alexander Dow, had sentence of death, for breaking into the house of Bonnington, and stealing the whole writs and evidents of that estate, contained in a coffer, together with certain articles of furniture, and another coffer, also containing writs. As had Patrick Eviot, convicted of common theft, and of stealing a leather wallet, whereof the principal contents were certain title-deeds, which the owner was carrying, to obtain a charter of confirmation. On the 6th November 1635, Michael Scott is sent to an assize, on a charge of stealing certain bonds of borrowed money from the owner's chest; but he is acquitted. Relevancy is found to the same effect in these cases: Against Alexander Steel, for stealing three dispositions and charters of the estate of Towie;—against James Graham *alias* Gramoch

The Justices “ fand the dittay relevant as to that part anent the money and
“ writs, as it is lybelled, viz. By breaking up the pursuer's doors under cloud
“ and silence of night, out of his dwelling-house of Achredie.”

moch Gregorick, for invading the Duke of Montrose's factor, when collecting rents at Chappell-aroeh, and taking from him money or books, papers or accounts; and against John Johnston for stealing a pocket-book, containing bank-notes, "with several other papers of less value." In this case an objection was stated to the charge, and was over-ruled.

THEFT AND
STOUTHRIEF.

June 19. 1786.

It may be thought a confirmation of the same doctrine, that on the 3d July 1691, in the case of John Seton, libel for robbing the mail, was found relevant to infer the pain of death; which must have been upon the common law; because, though the trial was after, the offence itself was before the passing of the statute 1690, c. 3. *against robbing of the packet*. This plea is therefore stated for the pannel, and that to steal letters and papers, which are not objects of lucre, is not theft at common law. In answer, the prosecutor maintains the contrary, and that the statute was only explanatory of what had been law before. Likewise, in later times, indictments for robbing or stealing from the mail, have generally been laid upon the common law, as well as upon the statutes of the 5th Geo. III. c. 25. and 7th Geo. III. c. 50. which have been passed to cut off all doubt respect-

Case of Stealing
the Mail.

N

ing

The Lords "find that the said James Grahame, &c. pannell, did upon one " or other of the days, and at the place lybelled, with his accomplices in arms, seize " and take away money or books, papers or accompts, from John Graham of " Killearn, or that the pannell was art and part of committing one or other of the " saids crimes, relevant to infer the pain of death, and confiscation of moveables."

* By the first of these, it is death to rob the mail of any bag, packet or letter, though such robbery should appear not to be a taking from the person, nor on the highway, nor in a dwelling-house, nor by putting the person in fear. The same

is

CHAP. II.

Dec. 18. 1786.

ing any case, in a matter of such importance: Two instances of this were formerly mentioned; and a third, in which too this part of the charge was objected to, is the case of Charles and James Jamieson, who both had sentence of death, for stealing a mail from the stable-yard of an inn.

Theft of Things
animate.

1551, c. 9.
1567, c. 16.
1594, c. 214.
1597, c. 270.

Dec. 17. & 24.
1711.

WITH respect to the stealing of animate things, or living creatures, certain distinctions must be made. Our practice of course acknowledges the common exception of those animals which are wild, and in no degree under dominion, such as game in the fields, or fish in a lake or river, which there may be a trespass in taking without leave of the owner of the grounds, but which are not his property, to be stolen. And though it be true, that our statutes of different periods have punished the killing of beasts and fowl of certain sorts with great severity, when done at certain seasons, or with certain weapons; at one time with death, afterwards with confiscation of moveables, and at last with fine, and setting in the stocks; yet none of these laws create a property in the heritor of the grounds where the offence is done, nor make the trespass liable to prosecution at his peculiar instance, as owner of the animals, or upon a charge of theft. Therefore, in the only prosecution of this sort that appears in the record, that of the Duke of Gordon and the Advocate against Ronald Macdonald and others, for killing of forty deer, which they had driven, or which had strayed towards Lochlagan, from their

is enacted by the other with respect to the stealing of any bag, packet, or letter, out of the mail, or from any Post-office; and with respect to any servant of the Post-office secreting, embezzling, or destroying any bag or letter, which contains a bank note, bill, or other voucher for money, or taking such note or voucher out of a letter.

their pasture in the Duke's forrest of Benalder, the charge is not laid as for theft¹: Neither is it sustained at the Duke's instance, but that of the Advocate only.

THEFT AND
STOUTHRIEF.

ON the other extreme, with respect to all domestic creatures, or creatures *domitæ naturæ*, such as horses, sheep, poultry and the like, it is equally clear that these are the proper subjects of theft. And the same seems to be reasonable with respect even to animals of a wild and unreclaimed nature, if so confined and kept that they cannot escape, and may easily and at any time be caught, such as deer in a pen, rabbits in a house, or young pigeons in a dovecote; being then in nearly the same condition as their dead carcases after slaughter, which may certainly be stolen. But between these extremes, there lie a great number of more ambiguous situations, such as that of deer in a park, rabbits in a warren, doves in a dovecote, fish in a flank or pond, with respect to which it may not be certain what opinion our Judges would have held, if the Legislature had not made them the subject of special provisions; which declare that the taking of these things, or even the shooting at deer, rabbit or pigeon, without consent of the owner, shall be theft. The chief of these are the acts 1474, c. 60.; 1535, c. 13.; 1587, c. 59.; and 1579, c. 84.; which last declares, that in a person who is not responsible with his goods, for the pecuniary pains, the breaking of dovecotes, cunningaires or parks, may be punished with death on the third fault, even by an inferior court. The acts 1535, c. 13. and 1555, c. 58. extend

N 2.

the

¹ Interlocutor: " Finds the same as lybelled not relevant, at instance of the " said Duke of Gordon; but sustain the same relevant to infer a pecuniary mulct " against the pannells." It is ambiguous upon the libel, whether the deer were killed upon the Duke's grounds, or were driven from, or had strayed out of them. 24th December 1718.

CHAP. II.

July 23. & 25.
1623.

the same pains to the stealing of bee-hives, which indeed seems to be of the nature of theft at common law. It is true, that other statutes may be cited, such as the acts 1503, c. 69.; 1607, c. 3.; which appoint the transgressors in these several ways to be punished only with pecuniary or petty corporal pains, at least in certain cases. But notwithstanding this sort of variance, of which there are many other instances in our statute-book, the clear result of the whole seems to be the raising of these offences to the rank of theft, and an authority for inflicting death in case of flagrant and repeated guilt. Certain it is, that John Raitt and Alexander Dean had sentence of death for breaking into eight different gardens, and stealing garden-stuffs, and from some of them bee-hives; but whether they were convicted on these statutes, or on the common law as incorrigible thieves, does not appear from the record.

Theft of Things
animate.

In the law of England, no larceny seems to be acknowledged of animals of a base nature, such as dogs, singing birds, and other creatures, kept for whim or pleasure. This may perhaps be more suitable to their system, in which the pains are more definite, and which requires the value of the thing to be set forth in the indictment, and distinguishes between grand and petty larceny according to the amount of the value, (whereas of such things there is no determinate value, great or small), than it is to ours, where the Judge has free discretion to proportion the pains to the whole circumstances, whatsoever, of the case, and may fix them as low as he sees good. But on this I have found no precedent. Special statute, 1474, c. 59. has interposed for the protection of hawk and hound, and especially the former, "in respect
" of the nobleness of its nature and use for princes and
" great

"great men¹," and has forbidden to steal them, "maide
"or wild, or out of nests," or even to take the egg out of
the hawk's nest in another man's ground, under the penalty
of L. 10.

THEFT AND
STOUTHRIEF.

Not to insist longer upon these. The most interesting article under this head of our enquiry relates to the stealing of a human creature, the *crimen plagii*, as it was termed in the Roman law. This might be committed, either by the selling of a free man to be a slave, whereof the punishment was capital, the same that is appointed by the divine law, or by enticing, concealing, or buying the slave of another, whereof the punishment was at first pecuniary, under the *lex Favia*, and afterwards arbitrary, according to the degree of the fault².

Stealing of human Creatures.

Exod. xxi. 16.

RIGHTLY considered, the away-taking and vending, or sending into captivity, of a person of grown years and mature discretion, seems to be a crime of a distinct nature from theft or robbery, and in nowise a patrimonial, but a proper personal injury, and one of the highest sort. It cannot fall under the notion of theft, by reason, if there were no more in the case, of the circumstances of force and invasion of the person, with which it must be accompanied. And even to call it a robbery, seems to be a perversion, and a figurative, rather than judicial use of the term; since the entire injury of such an act consists in the distress and suffering of the person himself who is taken, and not in any damage to others by the taking of him. It cannot therefore with any more propriety be called a robbery, than even the murder

¹ Hale, vol. i. p. 512.

² Dig. lib. 48. tit. 15. l. 1. 6. 7.

CHAP. II.

Jan. 12. 1604.

July 4. 1664.

der of him might be called so, by which his relations, metaphorically may be said to be robbed of their kinsman. Accordingly, I have not found any precedent of capital pain inflicted for this offence under the notion of theft. The light in which of old it was sometimes viewed, and even this seems to be somewhat a strained and artificial notion, (though it prevailed in England as well as here ¹), was that of a treasonable usurpation of the royal authority, in the detaining of the King's free lieges, without his licence or commission. This, in particular, is the form of the charge against George Meldrum younger of Dumbreck, who, beside other offences, was accused of the invading, taking captive, and conveying away of three persons; among whom was Gibson of Durie, one of the clerks of the Court of Session, whom he conveyed out of Fife, by Kinghorn, and Edinburgh, through Lothian, and by Melrose, into England. Being convicted of this charge, he had sentence of death and forfeiture, which proceeds upon the special narrative, that this, as well as certain other points of his dittay, were of a treasonable nature ². In the same form, the charge was laid and sustained in the case of the Viscount Frendraught, accused

¹ See Blackst. vol. iv. p. 76.

² Finding the said crimes, viz. the taking and apprehending of the said three persons, our Sovraine Lord's free lieges, prisoners and captives, and detaining them in captivity; and sicklike the said flouthrief of the foresaid twa pursis, and gold and silver being therein; and sicklike the taking of the said house of Dumbreck, and keeping thereof, quairof the said George Meldrum was convicted, *to be treasonable*, Be the mouth of Ro. Scott, dempster of Court, ordainit the said George Meldrum to be tane to ane scaffold beside the mercat crofs of Edinburgh, and thair his head to be strukkin frae his body, and all his lands, heritages, tacks, steadings, rooms, &c. to be forfealt, escheat, and inbrought to our Sovraine Lord's use, as convict of the said treasonable crimes.

cused of the wounding, carrying off, and at last murdering, Alexander Gregory of Netherdale; though in the debate the crime of *plagium* was mentioned, and the texts of the Roman law were referred to, as grounds of the libel¹. It does not appear, that for more than a century past there has been any conviction in the same sort²; and as no argument can now be drawn from any similitude which the offence may have to treason, so a just ground may seem to be wanting, especially if we consider the altered temper and condition of the country, upon which to inflict the pains of death for offences of this kind.

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STOUTHRIEF.

THE one case, therefore, which seems to be referrible to this part of our subject, is the away-taking of an infant child. For in this instance the creature taken, which has no will of its own to be forced, is as a *thing* under the care and in the possession of others, from whom it is taken, and to whom, without any violence, it may be said, and in common language is said, to belong, and to whom too the loss and distress of the taking of it is, which the child itself does not feel nor know. Neither is it an objection to this view of the transgression, that the child cannot be taken away for

¹ Libel: "As also by the laws and acts of Parliament of the kingdom, the taking and imprisoning of the lieges, without warrant, is a crime of a very high nature, to be punished as encroaching on his Majesty's power and royal authority."

"The Justices sustains the dittay only art and part of the murder, and taking and incarcerating the King's free lieges."

² Lieutenant Mark Ker, and others, were pursued (23d November 1649), for the rapt and taking away of Ro. Cunninghame, a youth, as it appears, of fourteen or thereby, from the possession of his uncle, and tutor or curator, Harry Cunninghame. The libel was sent to an assize, after debate on the title of his uncle to pursue, which was sustained. But in the end, (7th March 1650), the matter was remitted for trial to the Lords of Parliament.

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for the sake of profit. For, beside that the person of the child may be, and sometimes is turned to profit in certain ways, it is lucre in the estimation of law, that the child is detained and kept. The detainer has therein that advantage and benefit, whatsoever it was, which he coveted in taking the child away; and this, when reaped by custody and keeping of the thing, not by instant destruction of it without keeping or removal, is all the lucre which the law requires, and makes the case as much a case of theft, if the child were even stolen out of affection to itself, and much more if out of enmity to the parents, as if a person should steal a MS. from any one in a language to himself unknown, in order to distress him, or any other article on which he sets a value, and which is useless to any but the owner. Now, if there be no obstacle to the conception of the deed as a theft in this point of view, much less is there any in the nature of it, considered with relation to the wickedness of the offender, or the distress and misery it occasions to the parents or near relations of the child, both of which are out of all comparison greater, than in any other case of theft; not to mention the danger and facility of this invasion of a creature, which can make no resistance. Mackenzie hath accordingly said, that with us, Egyptians and others, stealing children, have been punished with death. And of this there was a late instance in the case of Margaret Irvine, tried and condemned at Aberdeen, by the Lords Hailes and Henderland, for stealing an infant from its father's house at Edinburgh, and travelling with it as a beggar, north to Aberdeen, where, at the distance of a year, she was taken with it in her possession¹. The case too, reported in Maclaurin, of

Sept. 24. 1784.

No. 61.

Jean

¹ The major of the libel, is in these words: "That albeit *theft* is a crime of
" a heinous nature, and severely punishable, especially that species of it called
" man-

Jean Waldie and Helen Torrence, seems to be another instance in point. For the libel bore a double charge; one of murdering the child and selling the body, the other of stealing the child alive, and shortly after selling his dead body; and the conviction, on which they had sentence of death, seems to be in the precise terms of the second charge.

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STOUTHRIEF.

IN regard to the raising of a dead body from the grave; this cannot in any proper sense be regarded as a theft, but may be prosecuted as a great indecency, and a crime of its own sort, the *crimen violati sepulcri*. In that form it was accordingly tried, and was punished with whipping and banishment, in the case of John Samuel. The English lawyers seem to hold, that indictment will lie for theft, if the dead-clothes are stolen along with the body. But I have not found any vestige of such an opinion with us.

July 5. 1742.

IX. HAVING now gained some notion of the nature of theft, we proceed to consider the pains which law has appointed for the transgressor. In entering upon this article, much shall not be said in relation to the controversy, though keenly agitated, respecting the justice or propriety of in any case punishing a single act of theft with death. That

Of the Punish-
ment of Theft.

“man-stealing or *plagium*, and when committed by stealing and carrying away “an infant of tender years from its parents,” &c. The jury recommended the woman to mercy, in respect that the person of the child did not appear to have been abused; and it is believed that she obtained a transportation-pardon.

“Finds them both guilty art and part of stealing John Dallas, a living child, “and son of John Dallas, chairman in Edinburgh, from his father’s house, at the “time and in the manner libelled, and of carrying him to the house of Jean Wal- “die, one of the pannels; and soon thereafter, on the evening of the day libel- “led, of selling and delivering his body, then dead, to some surgeons and students “of physick.”

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such a controversy should subsist, may not indeed be wonderful, considering how light the owner's loss in any one instance, when weighed against the life of a man; and moved by this humane view of the matter, many eminent lawyers, among whom Mathæus and Grotius, have loudly declared against what seems to be the almost universal practice of the nations of modern Europe. But that such is the common practice of an improved age, and in the most enlightened quarter of the globe, seems to afford a strong presumption, that there are considerations of general policy, or rather of necessity, on the other side, (if the peace, prosperity, and good order of society are to be consulted), which are of a nature too urgent and powerful, to let this scheme of mercy be put in practice. And indeed, if we shall not take into our view this of the character of crimes, with respect to their influence on the tranquillity or other great interests of society, but think of establishing a scale of pains for all offences, in proportion to their wickedness and natural deformity, it will not be in this one article of theft that the reformation must be made, but almost the whole system of punishments must be new modelled. As Hale¹ has justly remarked, "when offences grow enormous, frequent and dangerous to a state or kingdom, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death itself, is necessary to be annexed to laws in many cases, by the prudence of lawgivers, though possibly beyond the single demerit of the offence itself, simply considered." It is true, that entirely to suppress the evil, is not to be expected of this, nor of any other course of treatment; but it is not therefore to be concluded, that the

¹ Hale, vol. i. p. 13.

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the spectacle of this high and ultimate vengeance in such cases is of no efficacy towards reclaiming the petty transgressor, or guarding the young against the allurements of vice and evil example, or in general, in heightening among the people that respect for property, and that esteem of honest industry, which are the great basis of the happiness and prosperity of civil life. Besides, it is to be remembered, that any such lenity in the punishment of theft is not a matter which has no relation to others, and may be arranged without regard to them, but, if any consistency is to be maintained in the law, must be followed with the like relaxation in the pains of forgery, and many other offences, which, like theft, are only modes of patrimonial injury. If indeed this were understood to be the universal rule of punishment for theft, without regard to the small value of the thing taken, or other the extenuating circumstances of the act, there might be as little to say for such an order of things, in respect of policy as of humanity. But among the many authorities which touch upon this point, there is none that argues for such excessive rigour, or carries the precept farther than this, that a single act of theft may warrantably be punished with death, *si sit admodum grave*, if, taken in all its circumstances, it is a great and serious offence.

WITH regard to the practice of Scotland: Though Mackenzie has treated of it at some length, it is not with that order and precision which might be wished, nor is the general result of his discussion very easy to be gathered; though, on the whole, this is observable, that his remarks on the merciful side are rather the expression of his own sentiments with respect to the course which things ought to have, and what he says on the other is an account of the practice

Of the Pains of
simple Theft.

CHAP. II.

as it stands, and of the views which have actually governed it.

THE conclusion that arises upon these, which alone are the proper subjects of our attention, seems plainly to be this, that as theft is not a crime of one fixed and invariable degree of guilt, but may either be a venial or a heinous offence, according to the circumstances of the act, and the situation of the culprit, so by ancient custom, grounded on this substantial reason in the nature of the thing, our Judges have an equitable discretion of attending to the whole particulars of any case, and proportioning the sentence to the evil of the example, and profligacy of the offender; whereby he in some instances may escape very lightly, and in others shall suffer the highest pains that are known to the law. That is to say, if on attending to the value of the thing stolen, the mode of the theft, qualities of the offender, and whole case, the fact appears to be no more than a pickery, to which he may have been betrayed by youth and opportunity; or if it is of a higher, but still excusable description; or if it marks a daring or practised offender; or is of such a kind, that the example of it is very dangerous: I say, according to these equitable considerations, the Court have power to deal with the pannel, inflicting the capital pain for even one act of simple theft, if taken with all its qualities, it is a *furtum grave*, and being bound to shew mercy, more or less, if it is a mere pilfery, or less considerable theft; because the course of practice hath been, to be tender in such cases.

Pains of simple
Theft.

IN testimony of this position, I may refer to one of the oldest authorities in our law, the *Leges Burgorum*, which speaking of him who is taken with a theft to the value of thirty-

thirty-two pennies and a half, expressly order that he be put to death "*ab eo suspendatur a quo captus est*." In like manner, our authentic statute-book, though it does not contain any law, which declares, as upon a new matter, or by way of general ordinance, that a thief shall be punished capitally, yet in many places implies that such is his forfeit, and cursorily and *narrative* speaks of *the pains of theft and death*, as of things which were known to be one and the same. The act 1579, c. 74. orders that a vagabond who deserts his master, to whom the magistrate has bound him, and returns to his vagrant courses, "shall be adjudged and suffer *the pains of death, as a thief*." The act 1581, c. 110. concerning the slayers and houghers of oxen, declares in the entrance of the enacting part, that these offenders "shall be esteemed and punished *as thieves*." It goes on to say, that such as receive or maintain them, "shall be esteemed and punished *as refetters and maintainers of thieves*;" and it finishes with an order as to both, that, "being duly called and convicted thereof, they shall incur *the pain of death* and confiscation of all their gudes moovabil," thus plainly assuming it as a known thing, that such in law was the estimation and punishment of a thief. The same thing is said in more direct and concise form, by the act 1587, c. 83. which ordains that destroyers of ploughs and plough-gear "shall be punished *therefor to the death, as thieves*."

THEFT AND
STOUTHRIEF.

THIS also is the conclusion which arises on comparison of the statutes 1600, c. 11. and 1606, c. 5. against the slaying of salmon in forbidden time. The first of these orders it to be punished "*as theft* in every quality, according to the committer's rank and estate;" and the other, which recites the former, and takes away the exception in it of cer-

tain:

¹ L. L. Burg. ch. 121. No. 6.

CHAP. II.

tain rivers, directs that the offenders in these rivers "shall underlie the paines foresaid of *theft and death*, according to the quality, rank and estate of the committers thereof." Mention may also be made of the statute 1567, c. 21. which prescribes with respect to thieves when taken, that they shall be presented to the Justice and his deputies, "give their takeris, havand power, *justifye them not to the death*, them-felsis."

Pains of simple
Theft.

THESE may suffice as a specimen of the language of our statute-book on this subject; with which the construction also of practice and custom entirely agrees. Not that instances are not to be found, and even many in number, of arbitrary pain applied to a theft of some importance: but neither is this anywise repugnant to our position, which only goes to the assertion of a discretionary power in the Judge to punish the single act with death, in such cases where he shall think that this high correction is due; so that the very terms of the rule imply a variable course of practice, in which the instances are numerous to the side of mercy.

Feb. 4. 1602.

Mar. 11. 1608.

July 11. 1623.

THE following are among the cases, which may be quoted in proof of this discretionary power. The case of Thomas Steele for stealing sixty-two sheep. The case of Thomas Frame, for stealing three oxen and one cow, belonging to Lord Balmerino, furth of his lands of Mulrum. The case of James Aiken, convicted on his own confession, of stealing sixteen sheep, furth of the lands of Craigingat¹. The case of Thomas

¹ Sentence. "To be tain to the Castlehill of Edinburgh, and there, *for his theft foresaid*, committed by him, to be hanged to the dead."

Thomas Neilson, for stealing a horse¹. The case of John Watson, convicted on his own confession, of stealing forty sheep, but of which he had refunded the value to the owner. The case of Henry Forrester, hanged upon a verdict, which, as far as concerns him, convicts only of the theft of a gun².

The

THEFT AND
STOUTHRIEF.

Sept. 7. & 10.
1661.

Nov. 26. 1662.
and

Feb 3 1663.

Dec. 15. 1686.

¹ It has been objected to this instance, which is taken notice of by Mackenzie, that Neilson was also charged as a common thief, and one who stood enacted for banishment. But it is no less certain, that no proof was attempted of that part of the charge, and that both the conviction and preamble of the sentence are expressly confined to the single act. The assize, 10th September, " fand, pronouncit, and declarit the said pannell Thomas Neilson, to be guilty, culpable, and convict of the theftuous stealing of the horse belonging to John Henderson in Woodfoot of Tullibody, after the form and manner mentioned in the dittay." — 11th September, " Thomas Neilson being brought forth of prison to hear doom pronounced against him, as he who was found guilty upon the 10th September instant, of the crime of theft contained in his dittay; the Justice-depute therefore, by the mouth of Henry Monteath, dempster of Court, decerned and adjudged him to be taken upon the 18th day of September instant, betwixt two and four in the afternoon, to the Castlehill of Edinburgh, and there to be hanged on a gibbet till he be dead."

² This act is indeed charged alternatively either as theft or robbery. But at that time the term robbery was often used very loosely; and in this case it was improper: For the fact was a pretended quarrel among persons drinking in an alehouse, in the course of which they struck out the lights, and ran off with what they could lay their hands on, without knowledge of the owner, who swore upon the trial, that he was only afraid of their hurting each other, and that he missed nothing for an hour after they were gone. The interlocutor finds the charge relevant for death under either quality: " Find the robbery or theft committed upon William Jackson's house, or art and part thereof relevant, *separatim*, to infer the pains of death, and confiscation of moveables." The verdict also makes use of both phrases, but chiefly theft: " And as to the second part of the lybel, the robbing of Jackson's house, they found the pannells have had a design to rob and steal, and for that end have had a combination with rogues to accomplish their design; wherefore the members of the assize, find the said Finlay Smith, guilty of robbing and stealing out of the said William Jackson's and
" gunne,

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Feb. 22. and
Mar. 1. 1697.

The case of James Hardie for stealing twenty-three ewes, and of John White for stealing forty sheep or thereby, both convicted on one libel. The case of James Macpherson, in February 1744, condemned to die for stealing two horses; which judgment was given after full debate upon the competency of the capital pain, and a thorough search, which is mentioned in the judgment, into the course of practice. The case of William Stewart, for stealing five cows and two stots. And the case of John Reid, indicted for stealing nineteen sheep, and being habite and repute a sheep-stealer, but only convicted "of the theft libelled," without any mention of habite and repute.

Feb. 16. 1767.

Aug. 1. & 2.
1774.

Pains of simple
Theft.

Oct. 3. 1709.

May 1. & 2.
1711.

May. 4. 1791.

To these may be added the following, out of many cases which have been decided in the same manner, by the Judges on the circuits. The case of John Macvittae, tried at Dumfries, for stealing fourteen sheep and a lamb. The case of Alexander Little, tried at Dumfries, for stealing fifty sheep. The case of Alexander Wilson, at Inverness, in May 1791, for stealing two horses, the property of one man, and taken at one time. And the case of James Grant *alias* Morrison, at Inverness, for stealing one horse of no great value, and taken from among a number ¹.

THOUGH

"*gunne*, and that the said Henry Forrester was actually with him the time of the *theft*, and art and part with him. And as to that part anent *stealing* of the goose at Duddingston, finds Smith guilty of the same *allenary*."

¹ The jury unanimously recommended the man to mercy, "in respect of there being only a single act of theft charged;" but the Judge (Lord Hailes) thought that the prerogative of mercy was with the Crown; that it lay with the Judge to dispense the law, and to prevent the hurtful opinion going abroad into the country, that it was not a capital crime to steal a horse.

THOUGH conviction did not follow on them, these interlocutors of relevancy are also authorities in point. On the 1st May 1712, at Inverness, the Lords Minto and Royston gave this interlocutor on the libel against John and Donald Roy, after debate on this very question'. " Find the pannels, or either of them, their stealing, away-taking, or the finding in their custody, at the time libelled, *four cows* belonging to, or that were in the custody of John Shaw in Ourlarnst, and their selling and disposing of them, or offering the same to sale, or *separatim* the said pannels, or either of them, their again stealing and away-taking *two* of the said cows that were placed with Ronald Maccroil, to be delivered to the true owner, or their being found in their custody, or *separatim* the said pannels, or either of them, their stealing, away-taking, or finding in their custody *three cows and one ox* belonging to, or that were in the custody and keeping of the said Donald Macpherson, which they offered to make sale of, or *separatim* their offering by force of arms to maintain the possession of the said goods unlawfully taken from the said John Shaw and Donald Macpherson, and resisting by the said force those that were in prosecution for the recovery thereof, *all separatim*, relevant to infer the pain of death, and other pains libelled."

THEFT AND
STOUTHEART.
Pains of simple
Theft.

AND in the case of Alexander Thomson, tried at Jedburgh, for stealing a pedlar's pack, this interlocutor was
P given
May 11. 1714.

Frazer, for the pannel, pleads, among other topics, " That unless the pannel had formerly been convict of two thefts, the conclusion of a capital punishment, as now libelled, can never be sustained." The prosecutor, in answer, cites Mackenzie, and says, that the practice of Scotland, in punishing the first act of theft capitally, is so well known, " that it were to lose time any farther to illustrate it."

CHAP. II.

given by the Lords Minto and Poltoun. "The Lords find the
 " said Alexander Thomson, his away-taking and stealing
 " about the time libelled, the said William Douglas's pack,
 " and goods therein, *the same being of considerable value*, rele-
 " vant to infer the pains of death, and confiscation of move-
 " ables, against the said Thomson; and *separatim* find the
 " said Thomson, his away-taking and stealing, also about the
 " time libelled, the said William Douglas's pack and goods,
 " *though of small value*, relevant to infer an arbitrary punish-
 " ment against him the said Thomson¹."

Pains of simple
 Theft.

It is farther to be observed, of some of those cases which
 issued in an arbitrary pain, that they were attended with
 such circumstances in the way of proceeding, as clearly in-
 dicate the opinion of the Court respecting the ordinary pain
 for such offences. Thus in August 1661, David Murdoch, be-
 ing convicted of stealing seven cows, and it being represent-
 ed for him, that he had made a free confession, that it was
 his first offence, and had been committed in a state of ne-
 cessity, and that the man was penitent, the Court do not
 however themselves venture to mitigate the pain, but refer
 the decision of it, as an extraordinary matter, to the Lords
 of Privy Council, from whom they receive a warrant,
 grounded on these extenuations, to give sentence of banish-
 ment instead of death. The same course was taken in these
 cases; that of Alexander Craig, convicted of stealing six
 sheep; of John Rae, convicted of stealing four sheep; of
 William Thomson, convicted of stealing three cow-hides,
 an old coat, and L. 27 Scots. The proceedings in the case
 of

Feb. 6. 1639.

Jan. 21. & 24.
 1662.

Jan. 8. and
 Feb. 23. 1664.

¹ The jury found the theft proven; "but does not find what value the pack
 " would extend to proven;" on which verdict he was pilloried and scourged.

of George Macdonald are of the same tendency. At craving judgment upon this man, who had been convicted of stealing seventeen sheep, Mr Solicitor reminded the Court, that in charging the jury he had expressed his hope that an arbitrary pain only would be inflicted, in case of conviction; adding, that though he thought it fit to bring this under the view of the Court, yet it lay with them to do as they saw cause. Now this sort of address, ordered to be entered on the record, marks the opinion of the Court, that the judgment of transportation, which in this case they pronounced, required to be accompanied with a statement of the reasons, which had moved them to this course of mercy.

THEFT AND
STOUTHEIF.
Feb. 22. 1772.

BUT what shall be esteemed a *furtum grave*, or great theft, such as shall bring the pannel into hazard of his life? Certainly the great value of the thing taken is always one article of weight against him: In as much as this circumstance, which allures and encourages the practised thief, as naturally alarms and deters the new offender: In as much too, as in taking so much more than he can need for the supply of any present necessity, he forfeits any plea which he might have on that ground, and shows a dangerous rapacity of temper, of which less hope of amendment

Great Theft;
what it is.

P 2

can

Compeared Mr Henry Dundas, " his Majesty's Solicitor-General, and re-
presented, That in summing up the evidence to the jury, he had taken the li-
berty of stating to them, that if the verdict returned by them should find the
pannel only guilty of the stealth of the sheep libelled, he, in that case, was per-
suaded, that the Court would not inflict the utmost punishment of the law; and
as it was still in the breast of their Lordships what judgment they would pro-
nounce in this cause, he had taken the liberty to bring this circumstance to
the recollection of the Court."

CHAP. II.

can be entertained¹. Judgments have been quoted, which proceed on this express distinction, and also other, no less proper and necessary judgments, which find that the stealing of a horse is such a theft, for which the offender shall have sentence of death.

BUT it would truly be a vain attempt to circumscribe this matter within the letter of any absolute or invariable rule. The Court, in giving judgment, consider the whole circumstances of the case, among which the value of the thing taken is but one, and liable to be affected by the other particulars of the situation. It often happens, that the thief himself is ignorant of the value of the thing when he takes it, as in pocket-picking; and it may either be that he had, or that he had not the opportunity of taking more at the time when he stole; on which ground he who steals a sheep or two out of a flock, having it in his power to steal a greater number, or the whole, has an argument in his favour, which he would not have if he stole the same number of sheep, when pasturing by themselves. And hence it comes, that judgments are to be found, more than one, which affix only an arbitrary pain to a theft of the same value, which in other less favourable cases, or at times of more frequent depredation of that kind, is punished with death. Thus in the case of James Inglis², the theft of three horses is found relevant to infer death,

Aug. 24. and
Nov. 1. 1720.

¹ In the case of William Creighton, on the south circuit, 1st May 1714, the Lord Minto found the stealing of one sheep only relevant to infer an arbitrary pain.

² The Lords find, " That James Inglis, pannel, having at the times libelled; " stolen and theftuously taken away from off the street of Edinburgh, a mare belonging to Alexander Brown, &c. and there being a horse belonging to John Gibson, &c. stolen about the time libelled, from Miln's Square in Edinburgh, " and

death, and the theft of one to infer only an arbitrary pain. The like distinction is made in sundry trials on the circuits; and on the 5th March 1734, John Scott, *alias* Park, convicted of stealing a horse, is only banished forth of Scotland, though he had even stolen it by breaking into a stable. On the whole, it is observable of these varieties of practice, that this discretion of the Court in the punishing of theft, has been to the great advantage of the pannel; since if a statute were to be passed, appointing an invariable pain for the theft of horses or cattle, certainly the public interest would not allow this to be any other than the pain of death, in any case, for the taking of even one.

THEFT AND
STOUTHEIF.

XI. BESIDE this of the value of the thing taken, there are other aggravations of the single act of theft, which also warrant the inflicting of the capital pain; some of which have relation to the person of the thief, and others to the mode of the particular theft. Among the former, I shall first attend to that most useful, as well as reasonable rule, which relates to the character of the pannel, and holds the single act of theft for capital, though not otherwise a *furtum grave*, if it be the act of a common thief, (*fur famosus*,) one who is held and reported, or *habite and repute*, (according to

Of a Thief Habite and Repute.

“and the said horse, within a few days thereafter, was found and seized in the pannel’s possession, in the town of Tranent; and there being another horse stolen at the time libelled, out of the Cowgate of Edinburgh, and thereafter, within a few days, also found and seized in the said pannel’s possession, and that he the pannel, when examined thereupon, did acknowledge that he had stolen the said last horse, all *jointly* relevant to infer the pains of death, and confiscation of moveables; as also, find *any* of the saids horses being stolen in manner foresaid, and within a few days found in the pannel’s possession, and he the said pannel, when examined, acknowledging that he had stolen *any* of the saids horses, relevant to infer an arbitrary punishment.” Nov. 1. 1720.

CHAP. II.

our phrase for it), to be one of that calling, and to make or help his livelihood in the way of thieving. In such a case, the general character and way of life of the pannel being duly established, the particular act comes to be regarded only as a confirmation and detected instance of his daily course of evil doing, and his punishment to be proportioned to the habits and calling of the man, as a trained thief, and common nuisance to the country. In older and more disorderly times, so much higher was the regard paid to this article of common *bruit* and fame, that one who stood convicted of it by an inquest, and could find none to answer for him, was on that one ground to be held as a proven thief or robber, and to be disposed of accordingly. "*Fiat de eo*," says the statute of Alexander II. c. 13. "*sicut de latrone probato*." To the same purpose, the *Regiam Majestatem*, b. 4. c. 14.; and c. 17. of the statutes of David II.; And this course of proceeding it probably was, that served as the foundation of that mitigated sort of charge, and more suitable to the altered condition of the country, which was received in after times, and still retains an undoubted place in the practice of our Courts.

Of a Thief Habite and Repute.

THIS rule is so well known, that it would be no less useless than tedious to confirm it, by referring to any considerable number of the judgments, which have been given to that effect. But I shall take notice of a few, which are chosen in the different periods of our practice. There is this memorandum in the record, of December 1539, "Cocky
" Turner

There are many memorandums in the older records, which would lead one by their terms to suspect that this had continued to be the law at a later time. Thus, 28th April 1554, "Thomas Armstrong *convictus de communi furto, communi furti receptatione, extraportatione et importatione, furtivo modo, et suspen*." But nothing can be affirmed with certainty upon such short and imperfect entries.

"Turner filius Jobannis in Dollar, convict de arte et parte,
"furti unius ovis lie wedder, a Johanne Lowres extra Dollar,
"item de supplemento et assistantia Georgii Herris, tempore sue
"existend. ad cornu regis, et de communi furto et suspen." On
the same day, ¹ Andrew Glenduthill is convict of stealing
an ox and a sack, et de communi furto, and is hanged. On
the 26th July 1557, Paul Anderson, convict of common
theft, and the stealing "unius rubei equi lie forit bassenit
"horse," has the like fate. On the 11th February 1584.
John Walker is convicted of the "theftuous stealing of the
"said gray staig, pertaining to the said Thomas Alexander,
"and of common theft, and resett thereof, infang and out-
"fang, of ——— in theftuous manner." The record is
marked on the margin, *convict. et suspen.*

THE following persons also had sentence of death, each
for a single act of simple theft, accompanied with convic-
tion as *habite and repute*. John Gray, March 17. 1581, for
stealing one ewe and a sheetful of wool, which he had pull-
ed from nine ewes ². Patrick Elliot, May 20. 1614, for
stealing a wallet, containing title-deeds, and articles of
wearing apparel. John Lawson, July 1. 1614, for stealing
a purse in the fair of Melrose. Thomas Henderson, March
9. 10. 1731, for stealing a horse. James Wilson and John
Macdonald, July 29. November 11, 12. 1751, for stealing a
chapman's pack. John Gordon, July 21. 1767, for stealing a
horse; which case was reported from a circuit to the whole
Judges, who found "that the crime of which the said John
"Gordon stands convicted by the foresaid verdict of assize
is

¹ These two entries are on a loose leaf of the record much defaced.

² MS. Abs. of Record in Adv. Library. The record for that year is not now
extant.

CHAP. II.

"is capital." As also the case of Thomas Gordon, February 5. 1782, for stealing ¹ two sheep.

Proof of Habite
and Repute.

IT is not sufficient to conviction of this charge, that the pannel is a person of doubtful fame, or one concerning whom suspicions are entertained, and evil rumours have been abroad. He must have laboured under the common *bruit* and defamation of the neighbourhood as a thief, and have had a character affixed to him as a brother and associate of the trade. In the case therefore of George Macdonald *alias* Badenoch, where the jury made this distinction, having found, "that it is not proven that the pannel is habite and repute a thief, although of a suspicious character," sentence of transportation only ensued.

Feb. 18. & 22.
1772.

ON the other hand, with respect to the proof of this repute: though judicial proceedings, such as warrants to search the pannel's house, or repeated commitments for, or convictions of theft, are the most unexceptionable, they are not however, the only or an indispensable evidence of this sort of charge. According to the settled practice, it may equally be established by the testimony, if positive and uniform, of credible and proper witnesses, who have cause of knowledge, and depone in general terms to the estimation of the pannel, with the neighbourhood and with themselves. We have instances of capital conviction in both ways. Upon the trial of John Johnston for pocket-picking², three convictions in inferior courts were given in evidence. In that of Thomas

June 19. 1786.

¹ This man had also severely wounded the owner of the sheep; but this was charged as a separate offence.

² On the 14th March 1786, Walter Ross had sentence of death, being convicted as habite and repute, and of two acts of pocket-picking; the one of a pocket-book with L. 26, the other of an almanack with L. 13.

Thomas Gordon, in February 1782, the proof was of the other description, with the exception of one commitment for an assault. In the case of Wilson and Macdonald, there was no testimony to any charge or commitment; but an associate swore to their way of life. In that of Thomas Henderson, one witness swore to a charge of horse-stealing, and two to the pannel's general repute.

By the ordinary stile of indictment, this of *habite and repute* is only laid as an aggravation of the special charges of theft. Should the pannel therefore be acquitted of these, and the repute nevertheless be found to be proved, no punishment can follow on the verdict, but at most only an award, in the way of prevention, ordaining the pannel to find caution for his good behaviour. Such an order was accordingly given on conviction to that effect, in the case of James and Ronald Macgrigor. It follows on the other part, that a general verdict of *not guilty* returned on such a charge, will not hinder the pannel to be tried, even the next day, for a different act of theft, charged with the same aggravation, drawn from his fame and course of life. For not only is the *habite and repute* no proper point of dittay, or punishable accusation, to which the maxim of *not tholing an affize twice* can apply, but farther, such a verdict cannot even be construed into an acquittal of that quality of the charge; on which the jury were not bound to pronounce, unless some special fact of theft had at the same time been proved, so as to make room for that sort of aggravation. This plea was stated and repelled in the case of John Reid, indicted in August 1774, for stealing sheep, and as *habite*

THIEF AND
STOUTHEIF.

July 29. and
Nov. 11. 1751.

Mar. 9. & 10.
1731.

Aug. 4. 1736.

¹ A proof of the same sort was brought in the case of James and Ronald Macgrigor, in August 1736, upon which the jury found, "that they are reputed to be thieves in the country."

CHAP. II.

and repute a sheep-stealer, and who had been acquitted on the like charge in 1766. It seems too to have been repelled generally, and without any limitation of the proof to the period between these years.

Of the Pains of
repeated Theft.

XII. FROM this kind of aggravation, which amounts to a presumption in law, founded on the character of the pannel, that he has often been guilty in the same sort before, we naturally pass to that other, also capital aggravation, which arises from his repeated trial and conviction as a thief. Which situation, as it deprives him of all those excuses, which may often be justly pleaded for the first trespass, and yields evidence of a perverse and corrupted habit of mind, so it justly places his life in the power of the Court.

UPON this head, lawyers have proposed two points to consideration; as to which they have been of different opinions according to their several casts of temper, and views of human character, or of policy and discipline. The one relates to the number of acts, and whether fewer than three, which shall warrant the inflicting of death, and the other to the course taken with these acts, whether they must be the subject of repeated convictions and punishments, undergone and disregarded by the pannel, or if it be sufficient that they are all proved at the same time, upon one charge and trial of the whole. Now, as to the practice of Scotland: it must be evident from what has been already said of it, that except with regard to mere pilferies and thefts of the very lowest and most venial nature, the state of the law is exclusive of any absolute limitation on either of these heads. For if it be true, as has been said, that the Court have a discretionary

ary power with respect even to a single act of theft, to punish it according to the wickedness of the act, as it can be collected from the whole circumstances of the case; much more must they have the like discretion in the trial of repeated theft, if the things taken be of any value, such as raises the offence to be more than a pilfery; though the acts are neither to the number of three, nor have any of them been the subject of a former conviction. That is to say, if upon the libel which is in Court, being the first charge against the pannel, he is convicted of two acts of theft, neither of them inconsiderable, and such as taken together and in their whole circumstances mark him for a practised thief; as if he have stolen two or three sheep at one time, and ten or twelve pounds at another, by picking the lock of the place in which it lay; then may sentence of death pass against him: though if he were tried for either of these acts separately, the same severity would not be applied to his case. Or, if upon the libel which is in Court, the pannel is convicted of one not inconsiderable theft, and is also proved to have had sentence of pillory or scourging for another theft of somewhat less magnitude, but such as merited those pains, this progress in boldness, and in contempt of the chastisement of the law, is in like manner a reason for dealing with him, as one who is in the trade, and is not likely to quit it.

THEFT AND
STOUTHRIF.

It is certain that the course of practice has been regulated by these views. Thus, on the 13th December 1557, John Fidler in Howburn, has sentence of death, being convicted of stealing eleven wedders, and of resetting his servant William Lithgow in his thievish misdeeds, particularly when he stole four wedders and an ox. William Middlebuy

Of the Pains of
repeated Theft.

June 7. 1614.

Q 2

has

CHAP. II.

has the like sentence, for stealing certain articles of wearing apparel, "and out-putting" (as the libel terms it), "ane brown ambling horse, the property of the goodman of Carberry, his master for the time," to another person, a notorious thief, who paid him part of the price received for it. As have John Brown and Andrew Hall, convicted on one libel of two acts of stealing a horse. In like manner, William Young and John Hamilton, have sentence of death on a verdict, which amounts to a conviction of sundry, (it is not said how many), acts of pocket-picking, done in society with each other¹. Again, on the north circuit, May 1721, in the trial of Alexander Maccoull² and others, indicted for sundry thefts of sheep and cattle, the Court found his guilt of any *one* of the charges, relevant to infer an arbitrary pain, and his guilt of any *two* of them, relevant to infer the pain of death. The case of James Inglis is another instance; for being convicted of stealing a horse, he, in respect thereof,

¹ The assize found it proven, "That John Hamilton, *alias* Scarlet, is guilty of combination and society of picking and cutting of purses or pockets, and other ways of stealing and thieving at fairs and markets, in so far as he took several persons oaths to do the same; and likewise find proven, That he is guilty of receiving the same money stolen, to bear their expence as they went through the country; and also finds proven, That whatever should be stolen should be delivered to him: And as to William Young, finds proven, That he is guilty of association by swearing to Scarlet, and stealing and picking of pockets, and delivering what was stolen to Scarlet: And as to John Garden, finds nothing of the libel proven." 12th December 1698.

² May 2. 1721. "Finds, That the said pannels, or either of them, being guilty or art and part of *any one of the thefts libelled*, relevant to infer an arbitrary punishment; but finds the said Alexander Maccoull, or either of them, being guilty or art and part of *two or more of the thefts libelled*, relevant to infer the pain of death and confiscation of moveables."

of, and of his former conviction of the same crime : in August 1720, is condemned to die. Lastly, at Inverness, Hugh Ross had sentence of death, on conviction of stealing eight sheep or lambs at one time, and five lambs at another, from the same farm.

THEFT AND
STOUTHRIEF.

May 18. 19. &
21. 1785.

THE question therefore with us, will only relate to those acts, which properly fall under the appellation of pilfering or little thieving, such as the breaking of gardens, or the stealing of poultry, or of handkerchiefs from the pocket. With respect to these, I have not found any thing in our records, to countenance the opinion that fewer than three offences shall be sustained to infer the pain of death, (if even that number be sufficient), or that the warning of successive trials and convictions shall be dispensed with. To require that number, seems to be in some measure the common practice of nations in cases of this description, and the rule has the support with us of this circumstance, that with regard to certain other petty offences, of a nature somewhat allied to theft, and which are ordered by statute to be dealt with accordingly, such as the destroying of green wood, and the breaking of dovecotes and cunningaires, it is only the third offence, that is punished with death.

1535, c. 11.;
1579, c. 84.

XIII. These seem to be the only aggravations relative to the person of the thief, of which notice can be taken, as grounds in law, of pronouncing judgment of death on him for

Of Theft in a
landed Man.

¹ John Brown, 8th February 1774, was hanged for stealing two horses, the property of different persons, at two different times. William Philp was hanged, 13th March 1769, for stealing a horse at one time, and two at another : And James Trotter, tried at Jedburgh, 26th April 1783, for the theft of two horses, stolen at different times. In each of these cases, the pannel was convicted of all the acts on one libel.

CHAP. II.

Aug. 11. 1601.
 Mar. 30. and
 April 1. 1601.
 Aug. 23. 1603.
 Jan. 12. 1604.
 Aug. 12. 1608.
 Sept. 6. 1610.
 July 2. 1617.

for his crime. The guilt is indeed greater in a near relation of the owner, or in his domestic servant, or other person in a situation of trust under him; as it also is if the thief be in that rank and situation of life, which ought to set him above the temptation of this mean and degrading vice. But although, in a certain degree, regard will be paid to any of these circumstances, as well as to several others which are easy to be imagined; yet it is not in such a manner, as entitles them to a place in this list of the known capital aggravations. In this the condition of the law is different now, from what it was in older and more unruly times, when thieving was not the peculiar habit of the low and indigent, but often common to them with persons of rank and landed estate, who not only robbed and plundered themselves, but entertained bands of lawless and broken followers, who, emboldened by their countenance and protection, set the ordinary powers of law, in some measure, at defiance. To repress so pernicious a disorder, the statute 1587, c. 50. raised the crimes of common theft, reset of theft, and stouthrief in landed men, to the rank and pains of treason; and on this law, many convictions were soon afterwards obtained. As in the case of James Davidson; James and William Wood; George Turnbull; George Meldrum; John Hamilton of Spittleshiells; William Douglas of Lincluden, a notorious thief and robber; and Adam Ross. In the second of these cases, the appellation of landed man was applied, (which may seem a doubtful judgment), to an apparent heir, in the lifetime of his father¹.

ACCORDING

¹ This forfeiture was afterwards challenged, as appears from an unprinted act of the 17th Parl. of James VI; which gives commission to the Court of Session to judge in the reduction of it.

ACCORDING to Mackenzie, the term of *common theft*, used in the statute, was not to be understood of habitual and repeated, but of simple and ordinary theft; but this is neither agreeable to the ordinary acceptation of the phrase in law language, nor to what Mackenzie himself has elsewhere said upon the same subject¹. The decision of this, or of any of the other controversies which had been moved respecting the construction of that statute, is, however, of no moment since the act of the 7th of Queen Anne, ch. 21. which abolished all the fictitious treasons of the Scots law, and reduced this sort of theft to its proper rank.

THEFT AND
STOUTHRIEF.

XIV. AMONG those aggravations which relate to the particular act that is under trial, the principal is, if it be done by means of violence. This may either be directed against the person of the possessor, and then it is properly the crime of robbery or stoutthrief, of which afterwards, or against the place of custody or deposit of the thing, where-to for security it has been committed.

Of Theft done
by violence.

IN general, it seems to be true of all theft, which is accomplished by the forcing or effraction of any shut or fastened place of keeping, that it is held to be of an aggravated nature, by reason of the bold and deliberate temper, which appears in the manner of the enterprise. Thus, he who steals by breaking open a booth, or other the like temporary place of sale, or by breaking open a chest, cupboard, or other lockfast place within a house, though his crime is not thereby so much altered as to receive any peculiar appellation, will, however, be more severely punished, (and, it may be, capitally), than if he had taken the same article from a more exposed and tempting situation.

BUT

¹ See Mackenzie, tit. Theft, No. 12, and tit. Robbery, No. 2.

CHAP. II.
Of Theft by
House-breaking.

BUT the species of violent theft, to which the law has paid the most particular attention, is that which is done by the violent entry of a house; for this it now distinguishes by the name of house-breaking, and holds to be in every instance a capital crime, without regard to the quantity or value of the spoil made, be it ever so inconsiderable. The plain grounds of this severity are, that the thing is done with that contrivance and deliberation, to which none but the practised offender is equal; and that in thus venturing his person to take the thing from within the very sanctuary assigned for keeping it, and notwithstanding all the obstacles contrived for its safe detention, he shows a resolute and daring spirit, from which even the inhabitants of the house, or any who shall try to seize or stay him in his purpose, must, by reasonable inference, be held to be in danger of their lives and persons.

Way of Entry
in House-break-
ing.

IT will not always bring a case within the description of house-breaking, that the thing is taken out of the house, and by means of an entry made with intent to steal; for if the entry is at an open door or window, the thief is in some measure tempted by the opportunity; as well as it is in some sort a wrong in the owner to leave his property in this neglected state. On the other part, law understands it to be house-breaking, wheresoever the thief opens a way into the house for himself, and overcomes the ordinary obstacles provided against entry thereof, and for the safe keeping of what it contains; though this should be done without the piercing or actual effraction of any part of the building itself, or of what is attached thereto: since it is nevertheless true, that the strength and security of the house is invaded and broken. Thus it is equally a house breaking to enter

ter the house by means of false keys, or pick-locks, or by any how putting aside the bolt, as by bursting open the lock. It was judged accordingly in the case of Alexander Snail¹, who had sentence of death for a single act of entry by false keys, and stealing an article of small value; as also in that of John Pringle, where a capital relevancy was found upon charge to that effect²; and again in the case of Smith and Brodie, who suffered death on conviction of a single act of theft, committed in the same way. Nor will it receive any other determination, if the entry is made by means of the true key, which the thief has previously stolen, or if, having occasion to be in the house, he unfasten a window or shutter, and so return in the night-time, and enter³.

THEFT AND
STOUTHRIF.

Dec. 19. 1698.

June 6. 1715.

Aug. 27. 1788.

R

LIKEWISE,

¹ The libel in this case charged various acts, but was restricted to a single instance of entry by false keys, as contained in his own confession; which bore, that after entry, he stole some butter from a chest, and was taken within the house, with false keys and a chizel upon him.

² June 20. 1715. " And find the pannell, his breaking the house of Mrs Ferguson, and robbing, stealing, or away carrying the linen cloaths lybelled, " about the time lybelled, or *separatim* the said house being broke, and the said " stolen goods, or part thereof, being depositat in the hangfman's house by the said " pannell, and his having of crooked irons or instruments proper for opening and " *picking of locks* found about him when apprehended, relevant to infer the pain " of death, and other pains lybelled; and sicklike, the said Lords find the said " pannell, his breaking into the shop of Agnes Clark, under cloud and silence " of night, and stealing of several things furth thereof, about the time lybelled, " or *separatim* the said shop being broke, and the pannell having the goods stolen " furth thereof, or disposing of the same, or part thereof, about the time lybelled, " and his having the said crooked irons or instruments proper for opening and *picking of locks* found about him when apprehended, also relevant to infer the pain " of death.

³ The libel against William Brown, collier, 16th June 1715, relates, That having occasion to be in a certain work-shop by day, he secretly thrust aside the latch

CHAP. II.

Way of Entry
in House-break-
ing.
Aug. 4. & 6.
1743.

LIKEWISE, he is guilty of no lower crime who enters by coming down the chimney; which was the fact in the case of Rendal Courtney, who accordingly had sentence of death¹; or who enters through a sewer which issues from a cellar, or other part of the house, and passes under ground: for neither of these is a place of entry, nor necessary to be any farther guarded than it is by its own nature, against attempts of this sort.

NAY, the same construction has more than once been applied to the case of entry at a window, by simply raising the casement, without removal of any bolt or other fastening: and certainly with as good reason; since the window is no place of entry more than the chimney, and the house is closed and secured against access, when the sash is let down.

Feb. 6. 1773.

July 18. 1785.
Mar. 14. 1785.

John Watson had sentence of death upon charge and proof of two acts of theft committed in that way². As had William Mills and Archibald Stewart, each of them for two acts; one of which, in either case, was charged without any mention of

latch of a window, and, returning in the night, opened the sash, and entered. But I cannot find that this libel ever came to any judgment on the relevancy.

¹ This man entered the house of Cadham, by means of a rope let down the kitchen-vent. The jury "find, That the house was *broke open and robbed*; and "likewise find it proven, That the pannel, Rendal Courtney, was guilty actor, "art and part, of the said *house-breaking and robbery*." The libel did not state "how the entry was, but, simply, that "he broke into the said house."

² "In as much as you the said John Watson, did by a window in a closet of "the manse of Maytown, &c. enter the said manse, and did theftuously and feloniously steal," &c. It appears from the proof that both in this, and the other instance libelled, he entered by raising the sash, without any force or effraction.

of force employed to make open the window'. This construction is farther warranted by the more ancient case of George Robertson, who was indicted (*inter alia*) for robbing the house of David Cunningham, having made his entry by creeping in at the window, after which he opened the door to his associate, Smith, without. The verdict found them guilty of the *thefts and robberies* libelled; and they had sentence of death.

THEFT AND
STOUTHRIF.

Sept. 16. 1672.

It may even be maintained, that it is substantially a house-breaking in certain cases, though the immediate act which gives admission is not the act of the thief, but of the possessor of the house. If the thief knock at a door by night, under pretence of asking the way, and upon opening rush in and steal, or if thieves beset a house to break into it, and the owner open the door to drive them off, and they overpower him and enter; in either case they seem to be answerable for it, as for an effraction of the building: because the owner is here no better than an instrument in their hands, and serves, in a manner, as a key to the house, which they

Way of Entry
in House-break-
ing.

R 2 have

" You the said Archibald Stewart did feloniously *break* or enter into a house called Neidpath Castle, belonging to his Grace the Duke of Queensberry, in the parish of Peebles, and county of Peebles, *by entering in at a window* of the said Castle, and did steal," &c.

" And this you (William Mills) did, by means of a ladder, by which you ascended to, and got in at one of the windows of the said counting-house."

The libel against Margaret Johnston and Helen Riddell, 7th February 1775, runs thus: " Whereas, by the laws of this, &c. house-breaking, or the opening of doors and windows of houses possessed by others, and feloniously stealing therefrom." These women were banished on their own petition.

John Allan was banished in the same form, on the 27th January 1774. He was charged with two acts of *house-breaking*; one by opening with some instrument, a door which was fastened with a timber bar on the inside, the other by lifting the window-sash of a laundry, and entering.

CHAP. II.

Jan. 10. & 17.
1665.

June 28. 1773.

have fraudulently and feloniously got possession of. The crime in such a case is an invasion of the house, coupled to a robbery or flouthrief; since the person of the master, as well the strength of the building, opposes their entry, and is overcome. We have had two instances of capital conviction upon a charge of this kind. Patrick Macgrigor had sentence of death for the theft of goods and money from the house of Inchbellie, whereof he and his accomplices obtained entry by calling up the master of the house under night, to shew them the way, and threatening to burn the house on his refusal; whereupon his wife, being terrified, opened and gave access to them; and they carried off a quantity of linen and other goods. The other is the case of John Brown and James Wilson, who having called the master of the house to the door under night, under the like pretence, instantly set upon, beat him down, and killed him; and having thus got entry, broke open his chest, and carried off a sum of money. In the first of these cases, the libel was however laid as for theft and hamesucken; of which last charge the pannel was acquitted: In the other, it was laid as for murder, robbery, and *house-pillaging*. To these illustrations may be added the case of a servant, who combines with thieves, and opens a window to them, by which they enter and steal. This seems to be house-breaking in all concerned: for the servant is art and part of a felonious entry made by his associates; and they make use of him, as they would of a pick-lock or other unlawful instrument, to accomplish their purpose.

Breaking out of
the House after
Stealing.

It is more doubtful, and in England a statute was therefore passed upon the case, whether one who conceals

ceals himself in a house with intent to steal, and after stealing breaks out of the house, to make his escape, is guilty of the same crime. The contrivance, deliberation, and even boldness of such an attempt, may seem to be little less than that of him who makes his way through the inclosure of the house before stealing. Yet I find, that in two cases of this description, that of James Mackenzie, and that of William Wright, the charge is laid as for simple theft, and the pannels are transported on their own petition.

THEFT AND
STOUTHRIEF.

Jan. 27. 1774.
Aug. 10. 1774.

It may likewise admit a question, whether it comes up to the notion of house-breaking, (though it is an aggravated theft, and may sometimes be punished with death), that one who is lawfully within a house, such as the occupier of a hired chamber, forces the door of another chamber of the house in the night time, and steals. It is true, there is here a breaking of what is part of the house, to accomplish the stealing; but still the thief is under the roof, and within the inclosure of the tenement, and has thus both better opportunity, and greater temptation to steal, than one who has to force his way from without. Such a case was that of Wilson, Hall, and Robertson, (tried in March 1736), who all had sentence of death, for forcibly breaking into a locked chamber in an inn, from another room where they had been drinking under night, and carrying off the money and effects of a lodger, who made his escape by the window, to avoid their violence. But the charge was made under the several names of *house-breaking, stouthrief or robbery*, to either of which last the fact certainly amounted; since the things were taken from under the special protection of the owner, and by means of an assault upon his person: Neither can it be said, upon the words of the interlocutor, to which of those denominations

Lodger breaking
into another
Chamber.

CHAP. II.

nominations the act was referred by the Court¹. But in whichever way this point shall be settled, it will not be pretended that there can be any protection to the person, who, being lodged in a barn or other out-house, shall leave it in the night, and enter the mansion-house, or any other of the out-houses, by breaking in at the door or window: If he does so, his act is quite the same, as that of one who has come from a greater distance.

What a sufficient
Entry of the
House.

IN regard to the circumstance of entering the house: This is no otherwise material to the notion of house-breaking, than as it enables the thief to seize and remove something which is under the protection and keeping of the building. It is not therefore necessary that the thief have been within the house with his whole person: He is guilty, if he has been in it in such a manner, and being so by violence, that he carries something off from within it. As if he forces open the casement of a window, and putting in his hand only, snatches up, and runs off with any article that lies within his reach. This was the opinion of the Court, upon the debate in the case of William Gadesby, who had sentence of death upon conviction to that effect. The English authorities, speaking of the crime of burglary², have said, that there is even a sufficient entry by the pushing of a hook, pole, or other instrument, into the house, to draw out goods, though

Dec. 21. 1790.

¹ The Lords find, " That the said pannels, or any of them, having, time and place libelled, *by violence broken into the room* where James Stark, collector, was lodged, or that they or any of them did carry off bank-notes, gold, silver, or other goods out of the said room, or that they or any of them were art and part of any of the said crimes, relevant to infer the pains of law." 9th March 1736.

² See Blackstone, vol. iv. p. 227.

though the offender have never been within it, with any part of his body. And, if this be true of that crime, which consists in the breaking of a house, with intent to commit a felony, though that object should not be accomplished, much stronger reason is there for the same construction applied to our crime of house-breaking, which is only then committed, when by means of the violent entry something has actually been taken away; so that the breaking and entry have fully answered the invader's purpose.

THEFT AND
STOUTHRIEF.

It is likewise certain, and falls under the common rules of *art and part*, that a person may be convicted of house-breaking, though with respect to him personally, there has never been an entry of the house at all. Thus, Donaldson broke into and entered a shop; and Calder watched without, procured a light, and received the goods which Donaldson threw out to him; and for this accession, Calder had sentence of death along with Donaldson. On the 7th of the same month, Charles Cocks had sentence of death, for an accession of the same kind. Also, in the case, already mentioned, of Wilson, Hall, and Robertson, (which was at least a case of southrief or violent theft), the office of Robertson, as charged in the libel, was to watch at the door of the inn, while his associates, above stairs, were employed in breaking up the door of the chamber.

May be art and
part, without
Entry.

April 6. 1780.

It has already been intimated, that the notion of house-breaking in the law of Scotland, is theft committed by violent entry of the house; so that without the removal of some article, in the same sense as already explained, under the head of simple theft, there is no ground for this sort of charge. But if any thing is taken, it signifies not of how little value

Theft by House-
breaking always
capital.

it

CHAP. II.

Dec. 15. 1698.

What Houses
are protected by
this Law.

July 18. 1785.

it be. The resolute and dangerous disposition of the thief, is manifest in the way of his attack; and it cannot be doubted of him who comes in this fashion, that more he would have taken, if more had fallen under his hands, and all circumstances had suited to carry it away. Many cases might be cited in proof of this, but I shall confine myself to one, which may serve instead of all others; the case, already mentioned, of Alexander Snail, who had sentence of death for entering a house by means of false keys, and stealing a small quantity of butter from a chest. The charge too was only proved by his own confession¹.

LAST of all, with respect to the places which have the benefit of this protection. It is not disputed, that every mansion-house, or tenement destined for habitation, enjoys it, how mean and fragile soever it be; as indeed the houses of the poor the more especially require to be guarded in this way, that they are generally weak in themselves, and are often left void during the day, and unprovided with any defence, other than that which the terror of the law shall lend them. Likewise, every dwelling-place is guarded by this sanction, whether it be or be not inhabited at the time, nay, though it have never yet been dwelt in, nor thoroughly prepared for habitation. One of the charges, on which William Mills had sentence of death, was the breaking into the house of Dalry, which, as the libel says, "had some time before been occupied by William Walker." And in the case of Stuart and Gordon, in March 1785, one article which was found relevant, and went to trial with the others, was a charge of house-breaking, committed "on a house which had then been lately built in Merchant Street in Edinburgh, for Thomas

¹ The case is printed entire in the Appendix.

“ mas Cleghorn, merchant in Edinburgh, and was at that time “ unoccupied by any person.” Which is more exprefs than any of thefe; on the 10th April 1783, Thomas Thomfon had fentence of death for repeated acts of breaking into new, unoccupied, and unfinished houfes, and ftealing the carpenters’ tools.

THEFT AND
STOUTHRIEF.

By the law of England, the crime of burglary relates to dwelling-places, and can only be committed upon any fhop, warehouse, or out-houfe, if it be adjoining to a manfion-houfe, fo as to have right to the fame protection, under the notion of being parcel of the manfion. And this may be a reasonable limitation according to the proper notion of burglary, already taken notice of, but would be quite unfuitable, and is not admitted in our law, which only recognifes the capital offence, when there is a ftealing as well as breaking. Every edifice, therefore, to what ufe foever deftined, whether it be a counting-room, public office, place of work, fale, ftore, or what elfe, is the fubject of a capital pain in the breaking; fo it be what can properly be confidered, and in common fpeech would be called, a houfe, or fhut and faft building, and is not a mere open fhed, booth, or temporary place of lumber. Charles Cunningham was capitally convicted on the 12th March 1783, for breaking into a wafh-houfe at one time, and a brufhmaker’s work-houfe at another: Alexander Mowat, on 8th April 1783, for picking the lock of a printing-houfe, and through this breaking into a counting-room, and ftealing: Smith and Brodie, on the 27th Auguft 1788, for breaking into the Excife-office, and ftealing fixteen pounds: Bruce and Falconer on the 14th Auguft 1788, and James Dick on the 28th November 1788, for breaking into the office of the Dundee Bank:

What Houfes
are protected by
this Law.

S

and

CHAP. II.

July 18, 1785.

Aug. 9. 1770.
 April 6. 1780.
 April 7. 1780.
 July 8. 1782.

and William Mills, (beside other acts) for breaking into a private counting-house, situated in a timber-yard¹. In all these instances, either the crime was charged under the name of *house-breaking*, or, which is a more advantageous form of charge, the theft was laid as aggravated in being committed by means of house-breaking. This, in particular, was the form of the libel in the case of Alexander Mowat, where the objection was stated, but was over-ruled, that the printing-house and counting-room were distinct from any dwelling-house, and were not themselves to be accounted a house; whereby the aggravation charged would not apply. In some instances, the term of *shop-breaking*, or other equivalent and fuller expression has been employed; as in the trial of Macdonald and Jamieson, Calder and Donaldson², Charles Cocks, and John Macdonald; and in others the fact has been charged as theft, aggravated in being done by breaking into a shop, warehouse, or other place of deposit, named and characterised according as the case required. But under all these different forms, the dittay is substantially the same, and equally falls under the capital sanction, which

¹ Charge of theft, aggravated by house-breaking, was also sustained against David Mitchell, 14th July 1791, for breaking into a feed-loft and a stable; and against Christopher Beattie and Margaret Thomson, 11th July 1791, for breaking into a waste-house. In both of these cases, the Advocate saw cause to restrict the libel to an arbitrary pain, and the pannels being convicted, were adjudged to transportation for life.

Alexander Leitch and James Wilmer, indicted for house-breaking, by entry of a coach-house, and a wash-house, had sentence of transportation on their own petition. 17th December 1785.

² “The forcibly and feloniously breaking open, or into the shops, or other places, used by the lieges for carrying on their lawful business, and stealing or feloniously taking away from such shops or places, merchant ware or goods.”

which the law has annexed to the act of stealing by violent entry of a house.

THEFT AND
STOUTHRIEF.

XV. THE other prime instance of forcible theft, is that which is committed by invasion of the person, and is now termed robbery, and formerly passed under the more general name of *stouthrief*; which was applicable, generally, to every sort of masterful theft or depredation.

Of Robbery or
Stouthrief.

1. It is proper in this place to repeat what has already been said of theft in general, but might perhaps be supposed not to apply here, on account of the aggravation of violence,—that the charge will not lie unless something be carried away. Though an assault be made with intent to take, and be on the very point of succeeding, as by the person having his purse in his hand to deliver, or letting it fall from his hand through trepidation, or being beaten to the ground insensible, so that accident only hinders the full accomplishment of the invader's purpose, it still is not a robbery, but only an attempt to rob; which may however be punished at common law, with the highest arbitrary pain. Beside the reasons for this in the nature itself of the act; under any other construction, the notion of the complete crime would be altogether arbitrary and uncertain¹. In the case therefore of

No Robbery, if
nothing is taken.

S 2

Gavin

¹ It was argued for the prosecutor, in the case of Cranstoun, in September 1723, that it was sufficient if the robber were once master of the *person*, for that he was thus master of his money too. But the libel charged, and the verdict found the abstraction of a certain article. And no interlocutor to that effect was given.

In the case of Edward Farrell, tried for robbery at the Old Bailey, in July 1787, it was found that the prisoner stopped the prosecutor, as he was carrying a feather-bed on his shoulders, and threatened to shoot him if he did not lay it down.

CHAP. II.

Feb. 11. 1782.

Gavin Lowrie, 18th March 1783, of David and William Dalgleish, 4th April 1780, and John Irvine, 25th September 1744, the assaulting and beating, or firing at a person with intent to rob, or on account of the refusal to deliver, is charged as a distinct and separate crime from robbery¹. For the same reason, the charge in the libel against Robert Steedman was, with respect to one article, made alternative, as for robbery, or an attempt to rob; the fact in that instance being, that the person assaulted having taken out his watch to deliver it, either he let it fall, owing to confusion, or it was by a chance-blow struck to the ground, where it was found lying, without ever, as far as appeared, having been in the pannel's hand. Acts of complete robbery were also charged in the libel; and the interlocutor was general, for the pains of law.

What is construed a taking by Robbery.

2. IN the construction of what shall be deemed a *taking*, we rather attend to the substance of the case, which is that the thing has come into the hands of the invader by means of his violence, than to the mode itself of the immediate act of apprehension. The purse shall therefore be held to be *taken*, though the owner, being terrified, have with down. The man laid it down, but the prisoner was seized before he could take it up. The Judges were of opinion, that the crime was not complete. Leache's Cases, p. 266.

¹ "As also the assaulting the lieges, and firing at them, in order to force them to give up or deliver their property, though not attended with the said effect, or the so firing, because such money or effects were not delivered up," &c. Major of the libel in the case of Dalgleish.

"As also the assaulting persons upon a public highway, with an intention to rob them, and knocking them to the ground with a bludgeon or other weapon, are crimes." Case of Lowrie.

with his own hand delivered it on demand; or though it have fallen to the ground in a struggle between them, if the invader lift it; or though the owner, meaning to save it, cast it aside into some place, where the invader discovers and seizes it: for still the thing passes into his possession by means of the assault which he has made. Thus, in the case of Anderson, Paul and Bannatyne, one of the articles charged to be taken from the person robbed, and which led to the discovery of the pannels as the robbers, was his hat, which had fallen from his head, in bringing him to the ground, and was laid hold of by one of the assailants. And this the Court held to be an article of the robbery, as much as their taking the money from his pocket. A plea of this sort was set up for Samuel Riccàrds, who argued, that to prevail on a woman by terror of his threats, to deliver him a little money with her own hands, was not robbery, but only concussion. No regard was paid to this strange defence.

THEFT AND
STOUTHRIF.

June 20. 1791.

Feb. 27. and
June 19. & 20.
1710.

3. In the construction also of the *carrying away*, the same rule is to be observed as in the trial of simple theft; that is to say, the crime is complete, as soon as any article has fully passed into the hands of the invader, though he be taken with it on the spot, the instant after; nay, in strictness, though from fear, or finding it not worth the keeping, he should instantly return the thing to the person robbed¹. The first of these points was settled, though contrary

What a sufficient carrying away.

¹ This was determined in the English case of Peat, tried at the Old Bailey in December 1781. The prisoner had taken Mr Downe's purse, but had returned it, desiring him to keep the purse, if he valued it, and give him the contents. But while Mr Downe was taking out the money, his servant jumped from behind the carriage, and secured the man. The Court determined this to be a robbery. Leach's Cases, p. 200.

CHAP. II.

Sept. 10 & 11.
1723.

No Robbery
without inva-
sion of the per-
son.

Nov. 7. & 21.
and
Dec. 12. 1720.

What violence
necessary to
Robbery.

trary to the opinion of Lord Royston ¹, in the case of James Cranstoun, who had sentence of death for the taking of only one article, with which he was apprehended on the spot, and in presence of the person robbed.

4. THE taking and carrying away must be by invasion of the person of another. This is not, however, to be understood in the literal sense, as if robbery could only be committed by the taking of those things, which are upon the person at the time, but in a loose and more general sense, as applicable to whatsoever thing is under the personal care and protection of the sufferer; so that unless by force or terror to him applied, it cannot be taken away. These things therefore amount to robbery; the taking of a person's horse from him, as he travels on the highway, or the horse of his servant who is attending him there, or his portmanteau from behind his servant, (which charge was accordingly found relevant in the case of Christopher Hög ²), or the forcible taking of goods from a waggon which he is conducting, or of sheep from among a flock which he is driving on the road, or of goods from a ship which he has charge of, whether in port, or stranded on the shore.

5. IT is another and an indispensable circumstance, that the thing be taken by violence; for herein is the distinctive character

¹ See Royston's Notes, tit. Robbery, No. 4.

² "The Lords find the pannell, his having, the time and place lybelled, attacked George Sheriff, factor to the Earl of Hopetoun, and taking a clogbag from behind a servant of the said George Sheriff's that was riding with him, and predoniously carried away the samen, or was art and part thereof, relevant to infer the pains of death, and confiscation of moveables."

character of the crime. But in the construction of this article, great latitude is used. There may be robbery without any wounding or beating of the person, (which, where it happens, may therefore be libelled as an aggravation, as it was in the case of James Andrew); and also without any forcible wresting or tearing of the thing from the person, or even any sort of struggle on the part of the sufferer to detain it. The law only means to oppose this sort of taking, as against the will of the owner, to that which happens privately, or by surprise, (in neither of which is there any application to the will or the fears of the sufferer), and understands it therefore to be violence, if the thing is taken by means of such behaviour and proceedings, as justly alarm for the personal and instant consequences of resistance or refusal. The mere display, therefore, of force, and preparation of mischief, whether this appears in the weapons shewn, in the number and combination of the assailants, or in their words, gestures, and demeanour, if on the whole circumstances of the situation it may reasonably intimidate and overawe, is a proper description of violence, to found a charge of robbery. In the case of Riccards, already quoted, the interlocutor of relevancy is as follows: "Find the pannel's having, the time libelled, *in a* " *rude and violent manner*, with a mortal weapon in his hand, " attacked Elizath Bruce upon the highway libelled, and robbed from her money and goods, relevant to infer the pains " of death." The libel in this case bore, that the woman, being threatened, delivered what money she had upon her. On the proof also against Stuart, Bannatyne, and Paul, who had all of them sentence of death for one act of robbery, it did not appear that the assault was accompanied with show of arms, nor with any sort of harm to the person robbed, farther than

THEFT AND
STOUTHRIEF.

Dec. 22. 1783.

June 20. 1791.

CHAP. II.

by pulling him to the ground, without a blow or other injury of body.

Is Robbery
without having
of arms.

July 31. 1758.

Mar. 25. 1754.

MORE particularly, as to the showing or having of arms or offensive weapons; whether this circumstance did or did not make any difference in the Roman law, (for that is a disputed point), it certainly is not material in ours, as appears from the case of Barclay, which issued in a capital conviction, notwithstanding the exception which on that ground had been taken to the libel. The charge against Hugh Lundie, is, as to one act, thus, That he jumped over a wall to a highway where two women were passing, "called out to them, *Damn you stand*, and immediately thereafter, he "gripped the said Mary Burnet, put his hand in her pocket, "and took from thence 8½ d. Serling." In another instance, the libel relates the matter thus, That he overtook a woman on the road, and addressed her, "demanding or asking fixpence from her, to which she having answered, *for what?* "he thereupon gripped her, took hold of her pocket, and "robbed her of 22 d. Sterling, being all the money she had "then upon her." A third charge is for the robbery of Elizabeth Allan, to whom the pannel had come up, "asking "of her if she had any money? to which she said, that she "had not, whereupon he forcibly laid hold of her pockets, "and took out thereof 2s. Sterling." These charges were found relevant, and the man was condemned and executed. But it is not even necessary that there be, as in these instances, a seizure of the person, and a taking by the hand of the invader. All fear of danger, arising from a constructive violence, which is gathered from the mode and circumstances of the demand, being such as ordinarily carry awe and terror with them, and may naturally induce a man to surrender his

his property for the safety of his person, is sufficient to make a taking *against the will of the sufferer*; which is the essence of robbery.

THEFT AND
STOUTHRIEF.

It seems however to be a point, which is at least worthy of consideration, (though in England it has more than once been determined against the prisoner¹), whether it will justify the charge of robbery, that the delivery is made out of fear of some other evil than personal and instant danger; as if money be extorted from a person by means of threats to set his house on fire, or to carry him to goal, or to bring a charge of sodomy against him. The ground of distinction seems to be this, that these are future dangers, against which as the person assaulted has the means of protection from the law, and otherwise; so, as a man of ordinary constancy, he is bound to subdue the apprehension of them. Whereas, the fear of instant and unavoidable injury to the person constrains and justifies submission; on which account it is that the law so severely punishes the offender, who proceeds in that way. The best, but I shall not say a sufficient reply to this objection, may seem to be, that the demand of money in these ways may sometimes be attended with such circumstances, as beget a reasonable fear of present violence, though not expressly threatened, in case of refusal to comply; and that the manner of the demand is truly no better than a disguise, which will be thrown off as soon as occasion shall require. In whichever way that point shall be settled, (with us it has not yet occurred), this at least will not be the subject of controversy, that if the person only

T promises

Fear of personal violence, if essential to robbery.

¹ See case of Daniel Hickman, July 1783; Patrick Donally, February 1779; and Samuel Gascoigne, October 1783. Leach's Cases in Crown Law, No. 124. 93. 125.

CHAP. II.

promises money at the time, and sends it afterwards, when out of the reach of personal violence, and free of any instant terror, it is a crime of quite a different nature, as much as where a person complies with the demand of an incendiary letter.

Thing must be taken feloniously.

6. IN the sixth and last place: robbery has this in common with theft, that the thing must be taken with a felonious intent; I mean on its own account, and with the purpose to appropriate it, not being the property of the invader. Thus, if John assault James to beat him, and in the struggle John become master of James's staff and carry it off, this is not a robbery; because the staff is not the object of the assault, and if at all attended to at the time, is not taken with an intention to keep it. This seems to have been the description of the case of Edgar Wright, where a pistol was carried off in the course of a drunken squabble, and mutual violence.

Dec. 15. 1788.

Place of taking is immaterial.

It is immaterial in our practice, though it seems to be otherwise in that of England, whether the thing be taken on the highway, or elsewhere. When taken on the highway, this circumstance, like the shewing of arms, or abuse of the person, has sometimes been charged as an aggravation; as in the case of John Irvine, 25th September 1744, and Charles Ross, 23d February 1747. It is also immaterial of what value the thing taken be; for though the value be ever so little, the danger and terror of the mode of taking make the robbery in every instance a capital offence, and place the crime along with murder, rape, and fire-raising, among the pleas of the Crown. This doctrine has never been disputed, and is exemplified in many judgments of modern date.

Value of the Thing taken is immaterial.

date. These are among the number ; the case of Barclay, 31st July 1758, for robbing of a silver watch, of the value of four guineas ; of Thomas Hickton and Francis Simpson, 12th March 1759, for robbing of a silver watch, worth four pounds ; of Robert Hay, 9th February 1767, for robbing of a silver watch and forty shillings ; of David and William Dalglish, 4th April 1780, for robbing of five shillings and a bundle of papers ; of James Andrew, 22d December 1783, for robbing of a silver watch ; of Chalmers and Feagan, for robbing of a gold watch, 8th April 1783. But the most remarkable of any is the case of James Cranston, in September 1723, where the one article by the verdict found to have been taken ¹, was a walking staff or cane.

THEFT AND
STOUTHRIF.

BEFORE I conclude, it may not be amiss to observe, that the same act may sometimes with propriety be charged both as robbery, and under other denominations. In addition to some instances of this which have already been taken notice of, I will mention one more ; the case of Robert Calder, against whom the charge was, that he had entered a lady's bed-chamber, in the night, by opening the casement of a window, to which he ascended by a ladder, and that

Same Act may
be Robbery and
House-breaking.

Nov. 9. 1762.

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¹ *Verdict*. " Find, That the pannel; on the day libelled, robbed Mr Charles Cockburn of his cane ; also with one voice find the whole other circumstances " proven in terms of the Lords their interlocutor." The other circumstances here referred to were these, That the pannel was seen and heard to demand Mr Cockburn's money, with a pistol in his hand ; that he was found standing by him, and threatened to shoot those who came up, and that Mr Cockburn, at this time, declared that he was robbed. These circumstances showed the felonious *animus*, but did not go to prove the taking of any article in addition to the cane.

The other capital cases of note are those of Robert Steedman, 11th February 1782 ; Gavin Lowrie, 18th March 1783 ; William Pickwith, 14th August 1771 ; all of them cases of conviction of repeated guilt.

CHAP. II.

she being alarmed, he by threats and violence subdued her resistance, and compelled her to deliver certain jewels which were in the chamber at the time. Now this was both a house-breaking, by the violent entry of the tenement, and at the same time a robbery in the house, by the taking of things from under the personal protection of the owner, and by putting her in fear: It accordingly went to trial under both denominations; but the pannel was acquitted. Perhaps the most suitable term of any to be employed in such cases, is our ancient, but of late neglected term of *Stoutbrief*, or violent theft, which embraces every sort of theft that is done by open force, and in contempt of the possessors of the things which are taken.

Of Herdship or
Depredation.

UNDER this description seems to fall that mode of theft, not so necessary to be considered at large now, as in former times, which was distinguished by the name of Herdship or Herdship; being the driving away of numbers of cattle, or other *bestial*, by the masterful force of armed people. This, according to Mackenzie, is the same offence with the *crimen abigeatus* of the Roman law: but whether the character of the *abigeus* lay in his violent manner of depredation, or in his habit of offending, and the quantity of his spoil, (which is at least doubtful on the texts of the Roman law ¹), certain it is, that we need not resort to that system, for authority to inflict a capital pain on the committer of herdship. For if the cattle are driven off in the corporal presence of the owners or their people; as in the case of Lauchlan Macintosh, who, in company with twenty

Jan. 18. 1666.

¹ See L. I. 2. and 3. Dig. de Abigeis, Carpov. Comm. ad. h. tit.—Alfo Voet, ej. Tit.

ty armed men, drove off three score oxen and seventeen cows, and wounded the tenants and others who pursued them ¹; and as in the case of Donald Bain, who, with a band of twenty armed men, drove off a herd of eighty-three cows, in presence of the two keepers, whom they assaulted and bound; this is an undoubted robbery; and as such it went to trial ² in these cases. But even when the taking happens out of the presence of the owners, or their servants, who fly perhaps on the approach of such a crew, it is still a case of violent and masterful taking, or *Brigancy*, (as it is sometimes called), and stouthrief, and not of simple theft; by reason of the circumstances of open invasion and general alarm to the neighbourhood, with which the spoil is committed. I shall not enter into any farther discussion of the law concerning those wasteful injuries, now almost unknown, though formerly so frequent and so destructive, as obliged the Legislature to have recourse to all manner of expedients, to repress them. By one statute, (1587, c. 101.), the reparation of the loss is laid on the captain or superior of the clan, within whose territory

THEFT AND
STOUTHRIEF.

Dec. 3. & 10.
1722.

¹ The affize " Finds the pannel L. Macintosh guilty and culpable of art and
" part of *the robbing and stealing* furth of the lands of Belshirie in June last, of
" three score oxen and cows, being the first article of the dittay; as also, they all
" in one voice cleanse the pannel of the robbing twa merchants, John Butter and
" John M'Robert, and of the haill remanent articles of the dittay, in respect they
" found the samen not sufficiently proven."

² " Find that the pannel having at the time and place libelled, with a compa-
" ny of armed men, *robbed* and carried off a herd of cattle; or, after carrying off
" the said cattle, when the pannel and his accomplices were pursued by a party
" of men, in order to rescue the said cattle, he the pannel did fire, or attempt to
" fire upon, or with his sword made resistance to the said party, or any one of
" them, or that the pannel was art and part of either of the foresaid alternatives,
" *separatim*, relevant to infer the pain of death, and confiscation of moveables,
" and repel the haill defences proponed for the pannel." 10th Dec. 1722.

CHAP. II.

ritory the goods are received, shared, or disposed of: And by another, (1581, c. 112.), the owners are empowered to seize and detain, until reparation made, as well the body as the goods of any person of the same clan to which the offenders belong.

Theft of Things
sacred.

THESE seem to be the chief aggravations in the manner of the particular act, which raise a theft to the degree of a capital crime at common law. It does not appear that we have any settled rule of punishing with death, the theft of such things as are destined to sacred or religious uses; though it is certainly an unfavourable circumstance to the pannel.

Dec. 6. 1556.

And it is true, that in the case of Adam Sinclair and Henry Elderlous, convicted for breaking into the church of Forres, and stealing chalices, priests ornaments, and gold and silver, the one had sentence to be hanged, and the other to be drowned; which, too, is expressed to be *ex speciali gratia reginae*; probably in lieu of some more cruel mode of death.

Statutory capital
Thefts.

XVI. IN regard to those thefts which are punishable with death by special statute; the list of them is very short, compared with that which has been found necessary in the situation of England. Indeed I find but one enactment of this kind (beside those, already mentioned, relative to stealing from the mail), which, for certain, extends to this part of the united kingdom. I allude to the act 18th Geo. II. c. 27. by which it is made a capital offence to steal any linen, cotton, callico, or other stuff there mentioned, to the value of ten shillings, from any bleaching-croft, or from any ground, place, or building, made use of by any callico-printer, bleacher, &c. for printing, whitening, bleaching, or drying of the same. The statute, however, bestows a discretion on the Judge,

Judge, which with us has been liberally employed, of ordering the offender to be transported for fourteen years, in cases where he shall think it reasonable.

THEFT AND
STOUTHRIEF.

XVII. I HAVE now touched upon these things, which seem chiefly to be observable, whether with respect to the description or the punishment of theft. In the close of all, I shall add a few words concerning that circumstance, by which, more commonly than any other, the offender is detected, and his guilt brought to light. I mean his possession of the stolen goods. That this, by itself, shall in every case be sufficient to conviction, would be too broad a position. Like that of other circumstances, the weight of it may be greater or less, according as the relative particulars in the case happen to be. But, generally, it seems to be true; that if the pannel is found in possession of the thing recently after it has been stolen, this, as it very much lessens the likelihood of his having got it otherwise than by stealing, is always a strong ingredient of evidence, and such as if aided by any other circumstance of moment, will be held a relevant ground of condemnation. If he has confessed upon examination before a magistrate; if he is a person of evil fame, and pick-locks are found on him; if he offers money to the officers of justice, to let him escape; or if he denies that he has the goods, and they are found in hidden or unlikely places; any one of these particulars, joined with his recent possession of the thing, and his inability to show a fair way of coming by it, will serve to turn the balance against him. This is the doctrine which results from the interlocutors given in these, among many other cases, which might be mentioned to the same effect: February

Possession of stolen Goods, its Effect as Evidence.

11. 1734, John Scott *alias* Park; March 19. 1728, James Inglis;

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Inglis ; November 1. 1720, James Inglis ; August 10. 1714, Hutchiefon, Tennant, &c. ; John Pringle, June 20. 1715¹.

C H A P.

¹ 11th February 1734. " And for informing the said pannel's guilt, sustain the following facts and circumstances relevant, *viz.* that there was stolen from Alexander Aitkine, &c. the time libelled, a horse, and that the next day thereafter, or in the morning of the day following, the said stolen horse was found in the pannel's possession ; and upon apprehending and examining him about the said horse, the said pannel did confess and acknowledge the theft, and repelled the haill defences," &c.

March 19. 1728. " *Separatim*, find, That at the time and place libelled, the said horse was stolen and taken away about one o'clock in the afternoon ; that the same day, a few hours thereafter, the pannel was seen pass by, about four miles from the place where the said horse was stolen, riding upon the said horse, at least upon a gray horse, having the same marks with the horse stolen, and being challenged, rode off in haste : That being upon this apprehended and examined, confessed he had sold a horse as described in the libel, to James Hamilton, and that the horse sold by him to said Hamilton, was said horse stolen from Sir James Justice, all jointly relevant to infer the same pains."

November 1. 1720. The Lords find, " That James Inglis, pannel, having, at the times libelled, stolen and theftously taken away from off the street of Edinburgh, a mare belonging to Alexander Brown, &c. and there being a horse belonging to John Gibson, &c. stolen about the time libelled, from Miln's Square in Edinburgh, and the said horse, within a few days thereafter, was found and seized in the pannel's possession in the town of Tranent ; and there being another horse stolen at the time libelled, out of the Cowgate of Edinburgh, and thereafter, within a few days, also found and seized in the said pannel's possession, and that he the pannel, when examined thereupon, did acknowledge that he had stolen the said last horse, all jointly relevant to infer the pains of death, and confiscation of moveables."

August 10. 1714. The Lords " find the house in Sheriff hall, possessed by Robert Barr, being proven to be broken up, or clandestinely entered into, about the time libelled, and the goods particularly libelled being proven to have been in the possession of the said Robert Barr the said time, and that *within a few hours thereafter*, the said goods, *viz.* the wearing cloaths, or any other two of the particulars

CHAPTER III.

OF RESET OF THEFT.

R ESET OF THEFT is the receiving and keeping of stolen goods, knowing them to be such, and with the intention to conceal them from the owner. And this offence makes a proper sequel of those of theft and robbery, as being

RESET OF
THEFT.

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" ticulars libelled, being found in the possession of the pannels, or any of them, relevant to infer the pain of death, and confiscation of moveables."

June 20. 1715. " Find the said pannel, his breaking the house of Mrs Ferguson, and robbing, stealing, or away-carrying the linen cloaths libelled, about the time libelled; or *separatim*, the said house being broke, and the said stolen goods, or part thereof, being depositat in the hangman's by the said pannel, and his having of crooked irons or instruments proper for opening and picking of locks found about him when apprehended, relevant to infer the pains of death, and other pains libelled. And sikklike, the said Lords find the said pannel his breaking into the shop of Agnes Clark, under cloud and silence of night, and stealing of several things furth thereof about the time libelled; or *separatim*, the said shop being broke, and the pannel having the goods stolen furth thereof, or disposing of the same, or part thereof, about the time libelled, and his having the said crooked irons or instruments proper for opening and picking of locks found about him when apprehended, also relevant to infer the pain of death."

At Inverness, May 2. 1721, in the trial of Alexander Maccoull, and others, for theft, Lord Dun, " Finds, that all or any of the thefts libelled being committed, and the goods stolen *soon thereafter* found in the possession of the pannels, or either of them, it not being alleged that they were come to the possession thereof in a way legal and warrantable, relevant to infer him or them in whose possession they were found, guilty art and part of the theft of these goods."

CHAP. III.

in some measure a continuation of them, and that which by its subserviency to the convenience of the thief, is one great means of attaching him to his unlawful course of life.

Refetter must be
in Possession.

1. It is the fundamental circumstance in the description of this crime, that the stolen goods are received into the offender's possession. That the person of the thief, having the stolen goods with him, is received and entertained by one who knows him to be such, and also knows the quality of the goods, is likewise a crime, but a different one from reset of theft; which requires a special concern of the refetter with the goods, a contravention by him of the things themselves, for the purpose of detention and concealment. Not that there may not be proper reset, though the thief continue in the house: for if the goods be once committed to the peculiar care and keeping of the master of the house, as by disposing of them about his person, locking them up in his chest, or hiding them, with his knowledge or connivance, in some secret place within his house, this is a contravention by him, and a clear ground of conviction. And on this footing proceeded the interlocutor of relevancy in the case of Anderson and others, in March 1701, and the sentence of infamy and banishment upon John Tennant, in the case of Hutchieson, Tennant, and others: for in both instances the thieves were taken in the refetter's house¹. The rule,

July 29. and
Aug. 10. 11.
1714.

¹ As far as concerns Tennant, the verdict, is in these words: "Find, That John Tennant had the breeches and carabine libelled, and produced in Court, concealed in his house, and that he kept a public-house for travellers, proven; and finds the pocket-book, produced in Court, to have been concealed, and found upon the person of the said Tennant; but do not find the property thereof to be proven to be Robert Barr's." These three articles were part of the goods stolen by the other pannels, Hutchieson and Macdougall, who had sentence of death.

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THEFT.

rule, therefore, is only meant to be delivered thus; that to harbour and entertain the thief, whether gratuitously, or for reward as a publican, he keeping the goods under his own exclusive care and custody, though with the knowledge of the entertainer, will not involve that person as refetter.

BUT if the pannel receive the goods into his keeping, it seems not to be material upon what footing, or by what manner of covenant, this happens; whether for his own behoof, as upon pledge, purchase, or exchange of them, or as depositary only for behoof of the thief. In either case, he feloniously continues the detention of the property from the owner, and does the same injury also to the public, by securing to the thief the reward of his industry, and heartening him in the trade.

As to the proof of the pannel's possession of the goods; no other rule can well be laid down but this, that the thing must be found in such circumstances, from which it is presumable that it was not put there by servants or others without his knowledge, but by himself, or with his privity and connivance. In the case of John and Elizabeth Bell, the jury found a certain theft proved, "and that
" part of the goods so stolen were found in the repositories
" of the said pannels in their dwelling-house at Fala-dam; but
" in regard the pannels were some considerable time absent
" from their said house, before the said stolen goods were found
" there, do not find it proven that the said pannels are guilty, art and part, in the stealing or resetting the said stolen
" goods."

June 11. & 15.
1736.

2. It does not seem to be a necessary circumstance of the crime, that the thing have passed immediately from the hands of the thief, into those of the refetter. When the
U 2 prosecutor

Must the Refetter receive directly from the Thief.

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prosecutor has proved the finding of the goods in the possession of the culprit, and in such circumstances as presume his knowledge of their theftuous quality, he has then made out his case. And when the pannel shows in exculpation, that he had them not from the thief himself, but from another person, he still has not a relevant defence, unless he at the same time show that he got them upon such a bargain, or from such a person, and on the whole in such a manner, as outweighs the presumption against him, and infers a lawful way of acquisition. For what if he had them from some member of the family of the thief, or from a confidant of his, who got them from him to keep, but finding his house unsafe, and fearing a search, conveyed them to the pannel. If, therefore, in the case of repeated changes of hand, the charge of reset is apt to fail, it is not because it is incompetent in these circumstances, but by reason of the difficulty of the proof, and of the weaker grounds of suspicion, generally speaking, which that situation affords.

Resetter must know that they are stolen Goods.

3. THE possession must be set forth, as that which is held in the knowledge of the vicious quality of the thing; wherein lies the entire wrong of the act, and the substance of the charge. Bare suspicion, therefore, of the fact, or that the possessor had reasonable cause to doubt whether his author had acquired the things lawfully, is no relevant ground of conviction of this crime: because in such matters the attention and sagacity of one man is so different from that of another; and though a person may be blameable, he is not, however, to be punished, on account of pure heedlessness or indiscretion.

Way of proving his Knowledge.

To require, however, that the resetter's knowledge of the quality of the things shall be proved by direct testimony to

RESET OF
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to the disclosure of the theft to him, would be little less than to secure him of impunity; because ordinarily, from the very nature of the situation, no such evidence is to be had: nay, from the jealousy and caution so natural to people of this sort, it will often happen, that no express communication ever takes place on the subject. The common and relevant mode of proof is therefore by circumstances of real evidence; such as the concealment of the goods in hidden places, the denial of them to the officers of justice upon their search, the attempt to disguise them by alteration or effacing of marks, the low price paid for them, the inconsistent accounts given of the manner of getting them, and the quality of the goods themselves, being such as those from whom they were got could not honestly have obtained: of all which it is a powerful confirmation, if the pannel himself or his author, is of evil fame as a resetter or thief. Among other interlocutors which have been given on this principle, notice may be taken of that in the case of Ludovick More, Duncan, and Robertson¹; who were in consequence

Jan. 27. & 29.
1726.

¹ " Find, That any of the houses or shops libelled having been broken, and
" out thereof goods and effects stolen, and the said stolen goods, or part thereof,
" having been found in some secret and concealed places, within or about the said
" pannel (Ludovick More's) house, *separatim* relevant to infer the pains aforesaid;
" and find, That soon after the said shops, or any of them, were broke open, and
" out thereof goods stolen, as said is, the said Andrew Duncan and James Robert-
" son, pannels, were apprehended at Belshiel, and in their custody and possession
" were found jilts, false keys, or pick-locks; and that they, the said pannels,
" when brought before the Sheriff-substitute of Lanark, did confess, that they
" had, about the time libelled, broke open any of the saids shops, or that they
" were known to dispose of any of the goods stolen out thereof, *separatim* rele-
" vant to infer an arbitrary punishment." The verdict was thus as to Duncan
and Robertson: " Finds proven, That soon after the shops in Hamilton, libel-
" led,

CHAP. III.

sequence convicted, and adjudged to be transported, for their respective guilt as thieves and refetter.

Refetter must
possess feloniously.

4. ANOTHER, and no less indispensable quality of the possession is, that it be felonious,—with a purpose of detaining the thing from the owner; because it may happen, though it cannot be a frequent case, that a person is knowingly in possession of stolen goods with an innocent, or even a meritorious intention. But, ordinarily, the vicious purpose will be presumable, from the same circumstances of evidence which establish the pannel's knowledge of the quality of the goods; so that when this has been proved, it will rather lie with him to substantiate, in the way of exculpation, and as he best may, the innocent or laudable view of his wittingly detaining the stolen property of another.

Refet sometimes
near a-kin to
Theft.

5. IN these several articles, the crime of refet has a near agreement with that of theft: And this, in some instances, may rise so high, as to make it matter of debate, whether the refet does not argue, and in fact amount to a participation of the theft itself. If two pick-pockets are plying their trade in different quarters of a market-place, and one of them runs off with a purse, and in passing conveys it to the other, who keeps and carries it away; this refetter, if he is to be called so, is truly art and part of the theft: because he is there to assist if there shall be occasion for it; he is
privy

“ led, were broke open, and out thereof goods were stolen, the said Andrew Duncan and James Robertson were apprehended at Belshiel, and in the custody and possession of the said Andrew Duncan were found jilts, false keys, and pick-locks, and that both the said pannels, when brought before the Sheriff-substitute of Lanark, did confess that they had about the time libelled broke open the said shops at Hamilton.”

privity to the time and circumstances of the particular fact ; and is concerned in, and continues the immediate act of removing the thing from the owner's power. The same seems to be true, if a person, having stolen a pack of goods from a waggon on the street, shall straightway repair with it to the neighbouring house of a known thief¹, who bestows it in his secret repository, and afterwards receives part of the contents for his assistance. In these and the like situations, owing to the continuity and near connection of the two acts, they are considered but as one ; and the receiver, by his concern in *the particular deed*, is held to be not only such, but more properly an accessory to the theft itself. Perhaps, though he has not fully explained himself, it is to acts of this description that Mackenzie applies the term of *immediate reset*², in that passage where he says that it is punishable as theft.

Be

¹ Anne Robertson was charged with theft and reset, 5th July 1717, on this narrative : That James Moffat having stolen a box, from a cart on the street of Edinburgh, he ran with it, straight-way, to her house ; where, after he had told her how he came by it, she took him to a private place in the house, broke open the box, and got a share of the contents. There is this *passage in the information for the prosecutor* : " The lawyers for Anne Robertson contended, that the fact " laid against her inferred only reset of theft, and not theft itself, and therefore, " before she could be found guilty of reset, the theft itself ought first to be proven.

" To which it being answered, that the libel as to her being complex, both " as to reset and theft, the Lords by their interlocutor found, that by dividing " the goods in her house, and in her presence, and drawing her share thereof, " there needed no theft be previously proven in order to infer the resetting upon " her ; and accordingly the debate proceeded against her as *guilty of the theft, or " art and part*, as well as Moffat, seeing it was offered to be proven, that she actually drew her share of the goods." There is, however, no such interlocutor in the record : Probably it was only the expression of an opinion. An act of indemnity prevented any farther trial.

² Tit. Theft-Boot, No. 7.

CHAP. III.

Nov. 25. and
Dec. 3. 4. 1728.

Be this as it may, it is certain with respect to those cases, where the immediate receiving of the stolen goods is coupled to a *previous knowledge* of the particular deed, and to *any sort of assistance* lent towards the perpetration of it, that the charge of reset can with no propriety be made use of. This I shall illustrate by the case of Anderson and Marshall. Anderson was a vagabond or gypsey. Marshall kept a house of resort for vagabonds. And both were charged as art and part of a robbery committed on Bailie Rule, early in the morning, upon the highway near Marshall's house. It appeared that Anderson and other gypsies were lodged in Marshall's barn on the night of the robbery, and that Marshall knew of Rule's intention to pass that way with a sum of money, and communicated this to Anderson. Anderson rose in the night from among his comrades, then asleep in the barn, stepped out at a window, almost naked, and having robbed Rule a short way off, returned to his quarters; where he threw in his staff at the window. At this moment, those within heard Anderson in conversation with Marshall; Anderson desiring him to take care of the money, and Marshall assuring him, "that it was as safe as his shirt." These were the chief features of the case; upon which the Court found it relevant to infer death and confiscation of moveables against Marshall, "his having been guilty, art and part, of the fore-said robbery, by outhounding, resetting, or rathabiting the same." He was accordingly found "guilty, art and part, of said robbery, by outhounding and resetting;" and had sentence of death along with Anderson.

Possession; if
presumed to be
as Thief or Re-
setter.

IN like manner, it may sometimes be matter of debate, upon the possession of the goods as proved, whether it infers guilt of theft or of reset. Now, as to this; in every case, the

the whole circumstances of the fact are to be weighed. But in general, if there be nothing farther to elucidate the matter, and more especially with respect to those cases, where the time and place of finding are not remote from the time and place of theft, so as to give countenance to the belief of a change of hands; there seems to be no ground in law for presuming that the pannel has the thing as resetter, rather than as thief. Or rather there seems to be reason for presuming the other way; because if he truly got the thing from another person, he has it in his power to show this; and with him, in these circumstances, the burden naturally lies of proving this, or any other defence, that is exclusive of the charge of theft. On this ground judgment seems to have gone in the case of Murdison and Miller, in which the verdict was considered by the Court as a special *finding* of the several facts of possession, effacing of marks, and the like, which are related in the libel.

RESET OF
THEFT.

Reset, how pun-
ishable.

Maclaurin,
No. 89.

Reset, how pun-
ishable.

Mar. 3. 1701.

6. NEXT of the pains of this offence. By the old statute of Alexander II. c. 21. the resetter was to be held and punished as the thief ¹. And Mackenzie has said, that this is still the law with respect to that sort of reset ², but not very well explained by him, to which he gives the name of immediate. Also it is certain, that in the case of Anderson, Fraser, &c. the libel was found relevant to infer death, as well against Anderson, who was charged with reset only, as against Fraser,

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who

¹ "Quicumque furtum ablatum sciens suscipit, in numero furum furantium habetur, et simili vindicta teneatur subiacere."

² Tit. Theft. Boot, No. 7.

CHAP. III.

who broke the house, and brought the goods to him.¹ I find too, that in several of the older pleadings, the two offences are cursorily spoken of, as being of the same degree, and punishable with equal pains.

Refet, how punishable.

YET I cannot discover, that in any one instance, judgment of death has passed on a refetter, not even on a common refetter, and much less for a single offence. And not only so; but sundry cases are to be found where the distinction is made between the thief and the refetter, by inflicting death on the one, and only arbitrary pain on

Aug. 11. 1714.

the other. This was done in the case of Tennant, who had sentence of banishment and infamy, for refetting the goods in his house, which Hutchieson and Macdougall were, upon the same libel, condemned to die for stealing. The

Mar. 14. 1785.

like rule of judgment was followed in the case of Archibald Stewart and Charles Gordon: For Stewart had sentence of death, being convicted of two acts of house-breaking; and Gordon, convicted of refetting the articles, and to a great value, carried off from one of these houses, was scourged, and transported for seven years. It is to be observed too of both cases, that the refet was in the course of the same night in which the things were stolen. A still stronger instance occurred in a trial at Jedburgh, before the Lords Hailes and Henderland, in September 1786. This verdict was returned against John Clerk and Thomas Martin, indicted for stealing

¹ The charge is against Anderson as refetter only. After relating the house-breaking, as committed by Frazer, Duff, and Millar, the libel proceeds thus: "All which stolen goods were receipt by the said Alexander Anderson in his house near Snelup, where the said William Frazer, Thomas Duff, and William Millar were apprehended within two days thereafter, having the said stolen goods in their custody as they were divided among them." The interlocutor "finds the same (libel) relevant against *Frazer and Anderson* to infer the pain of death." The other pannels were boys; and as to them the relevancy was limited to an arbitrary pain. Anderson was not convicted.

RESET OF
THEFT.

stealing and resetting horses: " Find the said John Clerk
" guilty of stealing and carrying away all and every one of
" the mares and horses mentioned in the said criminal libel:
" Find it not proven, That the said *Thomas Martin* is guilty
" as actor, or art and part, of stealing and carrying away any
" of the foresaid horses; but by a plurality of voices find it
" proven, That the said *Thomas Martin* is guilty of reset of
" theft as to the *horses* mentioned in the said criminal libel,
" which were stole and carried off by the said John Clerk
" from *William Wilson and sisters, Robert Wingate, Andrew El-*
" *liot, and James Thorburn.*" Now, on this verdict, which,
as to Martin, is a conviction of four acts of resetting stolen
goods of some value, that pannel had sentence to be scourged
and transported, at the same time that Clerk, the thief, had
sentence of death.

It is a confirmation on the same side, that in the case of Mur-
dison and Miller, the opinions of the Judges assume and im-
ply, though they do not directly lay it down, that reset of
theft, and even repeated reset, (for such in this case it would
have been), is the lower crime, and only liable to arbitrary
pain. Moreover, notice may be taken of the statute 1587,
c. 110. touching *the sellers of gudes pertaining to malefactors*,
which punishes those offenders, who seem to be at least a-kin
to resetters, with banishment only and confiscation of move-
ables. Taken together, these things conspire to beget a doubt,
whether, for proper reset, and although guilty of repeated
acts, a person may warrantably be punished with death; and
whether those authorities, which may be alleged on the other
side, are not rather to be understood as applicable to such
cases only, where the pannel may be considered as also art
and part of the theft. In itself too, such a distinction
in the punishment of these crimes seems to be a reasonable

Maclaurin,
No. 89.

CHAP. III.

thing. For though the one course of life may be little less pernicious than the other, which it so much forwards and encourages, yet there is a material difference of boldness and wickedness between the actual enterprise of theft, and the mere keeping of things which have already been taken away¹. That the highest arbitrary pain may be inflicted, is not the subject of dispute.

Reset, how punishable.

If it were even true that the thief and resetter may sometimes be punished alike, yet still a distinction would be necessary to be observed with respect to those thefts which are attended with aggravations. For whether the aggravation be by the habite and repute, or the repeated guilt of the thief, or even by the violent or deliberate manner of the particular act, these are qualities which affect the thief only, and not the resetter; whose act of detaining the stolen goods is distinct from the theft, and who, though he understand in general that the thing is *res furtiva*, may, however, be utterly ignorant of the particular way in which it was stolen. The resetter, therefore, and his act, must be judged in this respect by their own proper qualities, according to the value and nature of that which he has reset, the repetition of the act, and the fame and repute of the man.

Resetter, can he be tried before the Thief.

7. Now a few words respecting the prosecution of the resetter; which, according to Mackenzie, cannot take place till after conviction of the principal thief². That, in a certain

¹ On the 4th March 1751, Richard Begbie, convicted of three acts of reset, on his own confession, was sent to the correction-house for three months, and banished Scotland.

² Tit. Theft-Boot, No. 4.

certain sense, such a rule had once been received, seems indeed to be sufficiently vouched. It is laid down generally in the statutes of David II. c. 29. *de receptatore alicujus malefactoris*, that he shall not be tried till after the malefactor. And in the case of John Currou, indicted for resetting stolen sheep, this plea being moved, "The Justice fand the "same relevant." It is again sustained in the case of John Douglas and Agnes Mustard his spouse; and still more pointedly, in the case of James Clerk, "brouster at the West Port "of Edinburgh," where the Justice finds, "That be the "inviolabill practique of this judgment, the principal steal- "er man be first discussit before the receipter can be con- "venit."

RESET OF
THEFT.

Aug. 16. 1587.

June 18. 1623.

Mar. 19. 1634.

THESE judgments were, however, all of them given under certain modifications, as relative to the case of the principal thief being known, and neither brought to trial, nor even called and outlawed. The argument in the case of Douglas carries the plea no farther, and the Justice assigns his reason for his interlocutor, "in respect nae diligence is usit against "the said Margaret Ahannay," who was the principal thief. The restraint, therefore, went only thus far, that the thief, if known and in custody, was in the first place to be brought to trial; and if not in custody, was to be outlawed for non-compearance. But that if the thief were unknown, or were dead, or were abroad, or could not be taken, the resetter was to escape unpunished; this would not have been reasonable in itself; nor does it appear from our records, that any such rule was ever established. Such as the rule was, it has long

Resetter, can be
be tried before
the Thief.

¹ In the case of Graham, 18th December 1663, to which Mackenzie refers as a confirmation of the rule, the verdict was rescinded on a quite separate ground,

CHAP. III.

Aug. 9. 1770.

long been thus far relaxed in practice, that the thief and refetter may be tried at the same time, and upon one libel: as was done in the case of Anderson and others in 1701; of Ludovick More in 1726; of Stewart and Gordon in 1785; of Clerk and Martin in 1786. It is also competent, (and in this course the objection is in a great measure avoided), to lay the libel with an alternative charge of theft and refet, or one or other of them, as in the opinion of the jury the fact shall turn out to be. This was done in the case of Murdison and Miller, in 1773, and in that of Macdonald and Jamieson, where it was objected, that such a charge was inept and inconsistent. But this objection was repelled.

ground, viz. That it was disconform to the charge; the one being for theft, and the other for refet.

This question was again debated in the case of Francis Mellum, 21st February 1676. But there "The Lords declare, that they do not give answer to the defence founded on refet of theft, because it is not libelled in the subsumption."

CHAP-

CHAPTER IV.

OF WILFUL FIRE-RAISING AND MALICIOUS MISCHIEF.

NEXT after theft, house-breaking, and stouthrief, the chief ways in which property may be taken away from the owner, we shall attend to those offences by which it may be wilfully damaged or destroyed.

MALICIOUS
MISCHIEF.

I. It may be affirmed with respect to every act of great and wilful damage done to the property of another, and whether it be done from malice or misapprehension of right, that it is cognisable with us as a crime at common law; if it be done, as ordinarily happens, with circumstances of tumult and disorder, and of contempt and indignity to the owner. For instance: to enter a person's lands with a convocation of servants and dependants, and cast down the houses, or root out or spoil the woods, or throw open and deface the inclosures; to break down in the same fashion the sluices and aqueducts of a mill; to break or burn the boats and nets at a fishery; to tear and destroy the peats, turf, and fuel, in a heath or moor; all these are competent articles of dittay. The same is even true of the bare usurpation of possession, though without any great damage

Of wilful and
riotous Mischief.

CHAP. IV.

mage done to the property, if it be accomplished by the show of a masterful force; so as to have in it a mixture of riot, as well as of molestation or intrusion.

Mar. 6. & 9.
1671.
Nov. 13. 16. 17.
1674.

Cases of riotous
and wilful Mis-
chief.

June 30. and
July 7. 1712.

Dec. 7. 14. 19.
1713.

THE casting down of houses was found relevant in the case of Donald and Charles Robertsons. And it was again found relevant in the case of William Leitch and others; as was also the charge of tumultuously intruding into the possession of the pursuer's lands, threatening his herds, beating and hounding off his cattle, consuming the pasture, breaking the turf to build folds, and other the like acts. In the case of Mungo Grant and others, it was found relevant, that, with an armed force, he had intruded himself into possession of the house of Castlegrant¹, and excluded the lawful possessor. And the like judgment was given on the libel, at instance of Glas of Sauchie, against Monro of Auchinbowie and others, his baron-officer and tenants, for pulling down a dam-dike, of which the pursuer had been in possession, and thereby *setting his mill*; that is, stopping it through want of water². The libel in this case was laid up-
on

¹ The Lords "Find, That the pursuer, having the possession of the house of Castlegrant, by having the keys thereof, and by having his furniture and servants there, and the said Mungo Grant, &c. their or either of their going, about the time libelled, and entered the house of Castlegrant with armed men, and refusing the pursuer access thereto, relevant to infer an arbitrary punishment and damages." This action was afterwards deserted.

² The Lords "Find the pannels, all or either of them, about the time libelled, their pulling down, or assisting to pull down, and utterly destroy, the dam-dike libelled, and thereby entirely diverting the water from Sauchie's mills, and the use of it from the mills of the other pursuers, *who had been in possession thereof*, by cleansing, redding or repairing the aqueduct running from Loch Coulter, before it fall into the water of Bannockburn, whereby the pursuers their mills were laid waste, or put from going, relevant to infer an arbitrary punishment

on possession rather than right, and the jury having found, that, though for some years the pursuer had been in possession of the dam-dike, yet the pannel had formerly been in use to open a breach in it, and to *set the mill at pleasure*; whereby the possession was fluctuating; the issue was only in a sentence to repair the dike, and abstain from pulling it down in future, without order of law ¹.

MALICIOUS
MISCHIEF.

THE pursuer in the following case was more successful. Rigg of Morton pursued John Trotter of Mortonhall, for coming, with a number of accomplices, some of them armed with invasive weapons, to the precincts of his house at Morton, and there entering his nursery grounds, and treading down the plants, destroying the turf prepared for a bowling-
Y green,

Cases of riotous
and wilful Mis-
chief.

Nov. 8. 15. 30.
Dec. 6. 1714.

" punishment *against all and every one of the pannels*, and reparation and damages
" against the pannel Major George Monro himself; and sustain the defence, that
" the Major, or his predecessors, were in use to bring the water libelled to the
" service of his own mill of Auchinbowie, so as to set Sauchie's mill entirely, re-
" levant to elide the said libel and conclusion thereof." Judgments to the same
purpose, respecting a mill, are in Balfour's Practices, p. 494 c. 6. It may be ob-
served, that a defence was pled for the baron-officer and tenants, as persons
acting on the command of a superior. But even in a case of this sort, the libel
was held relevant *against all and every one of the pannels*.

¹ " Found it proven, That Major George Monro of Auchinbowie, and whole
" other pannels, are guilty of pulling down the dam-dike libelled, and thereby
" wholly diverting the water of Loch Coulter, so as entirely to set Sauchie's
" mill; and farther, finds it proven, that Sauchie, Bannockburn, and Polmaes,
" have been in possession of the said water, by cleaning, redding, and repairing
" the aqueduct, running from Loch Coulter, before it fall into the water of Ban-
" nockburn; and farther, finds it proven, that the tenants and servants of Au-
" chinbowie's predecessors were in use, as oft as they had occasion, to bring down
" the said water of Loch Coulter to the mill of Auchinbowie, so as entirely to
" set Sauchie's mill from going, except the last twelve years."

CHAP. IV.

green, and tearing and cutting that part of the turf which was already laid. This was found a relevant charge ¹, and the pannel, being convicted (excepting as to the nurseries), paid the sum of L. 40, of fine, damages, and expences ².

ON the 13th of July 1730, Henry Trotter of Mortonhall, was prosecuted by Lord Sommerville, for causing his servants violently beat down part of the pursuer's feat, or loft in the church of Libberton; which appears to have been done on account of an alleged encroachment on the feat which belonged to the pannel ³. The pursuer had a favourable

July 25. and
Aug. 4. 1730.

¹ " Find the said pannels, or any of them, their entering the precinct of the
" said Mr Thomas Rigg his house at Morton, where his family resided for the
" time, (and cutting the turfs), and cutting the turfs that were lying ready to
" be laid in the complainer's bowling-green; or *separatim* the said pannels, or ei-
" ther of them, their tearing up and destroying the turfs, or any part thereof,
" that were already laid in the said bowling-green; or *separatim* the saids pan-
" nels, or either of them, their treading down and destroying the complainer's
" nurseries there, all about the time libelled, relevant to infer an arbitrary pu-
" nishment, damages, and expences."

² Trotter entered a protest against this sentence, " for remead of law to King
" and Parliament."

³ 20th July 1730. " Find, That Henry Trotter of Mortonhall, pannel,
" having ordered his servants, or others, to beat down a feat or loft, or any part
" thereof, built by or for the behoof of James Lord Sommerville, pursuer; and
" the servants, or others, so ordered by the pannel, having, at the time and place
" libelled, violently beat down the said feat or loft, or any part thereof, or that
" the pannel was art and part of the premisses, relevant to infer an arbitrary pu-
" nishment."

The libel begins thus: " That where by the laws of this and all other well
" governed realms, all riots, and violent invasion of property or possession, and
" atrocious real injuries, such as the pulling or beating down with axes, ham-
" mers, or such other like instruments, the seats and lofts in churches belonging
" to any of our subjects, or decorations put upon them for the decent adorning
" of

able verdict; and the pannel paid L.100, of fine, damages, and expences.

MALICIOUS
MISCHIEF,

THESE may serve as a specimen of the course of practice in times past, (for of late years the civil courts have more commonly been resorted to for redress of such injuries), with respect to violent or tumultuous molestation, intrusion, or invasion of property.

UPON the whole of them, these things seem to be observable. 1. It will not acquit the pannel, that there is a controversy between him and the pursuer concerning the matter of patrimonial right, (as happened in every one of the instances which have been quoted,) and that he proceeded in the belief of a civil wrong, previously committed by that person against him. For he is not excusable in forgetting that the courts of law are open to his complaint. 2. It is grounded in the same reason, namely, the due regard to the order and tranquillity of Society, that the pannel shall equally be convicted, whether it be that he interferes with the property of another, or only with his state of peaceable and lawful possession. For neither is this to be broken but by the order of law. This rule especially appears upon the terms of the interlocutor in the case of Monro. 3. That which law in such debates chiefly regards, is not so much the patrimonial damage sustained, (which in most of these instances

Grounds of Relevancy in such Cases.

Y 2

was

" of the said seats, lofts, or churches, in a riotous, masterful, and lawless manner,
" by assembling any number of persons together, armed with the instruments a-
" fore said, which might have occasioned tumults and great disorders, and had
" fatal consequences, are crimes of a high nature," &c.

It appears, that the act which gave occasion to this libel, was the pulling down of a Dorick pilaster in Lord Sommerville's seat, which, as Mortonhall alleged, encroached upon his seat. It was aggravated, in being done a day or two before the dispensation of the sacrament.

CHAP. IV.

Nov. 15. 1714.

Aug. 2. 11.
1714.Poisoning of
cattle, sheep, &c.

Nov. 5. 1600.

was but trifling,) as the insult both to the public and the individual, by the violence and tumult with which the thing is done. Hence, on occasion of the above controversy between Rigg and Trotter, the latter having recriminated, under the pretence that Rigg had raised the turf for his bowling-green from a spot of land which belonged to Trotter, but without specifying any circumstance of violence or disorder; this was held to resolve into a question of trespass, or controverted marches, and to be no relevant ground of a criminal charge. In like manner, upon a libel against Sir James Dunbar and others, which bears a charge of sundry usurpations and iniquities committed by the pannels, one article is dismissed for this reason, that no qualification of violence is set forth ¹.

THIS limitation is, however, only applicable to the case of inconsiderable injuries to property, or to such as may have been done by the pannel under the misapprehension of right. For if any one go and poison his neighbour's dogs, sheep, or cattle, or mangle them by cutting out their tongues, breaking their limbs, or the like, certainly this is a crime, and punishable with severe pains, though he proceed ever so secretly in the execution of his wrongful and malicious purpose. Nay, I find that for the poisoning of poultry, Thomas Bellie, burghers of Brechin, came in the King's will, and was banished under pain of death; having mixed arsenic with dough, and thrown it down in the court-yard of his neighbour, Janet Clerk, to poison her fowls; whereby some of them were killed.

THIS

¹ "As also, find the second article, viz. That Forsyth did by himself, or by order of Sir James Dunbar, possess a part of the lands set to the pursuer, and wherein the pursuer had been in possession, not relevant in a criminal process, no violence being libelled, without prejudice of any civil action as accords."

THIS judgment proceeded on the common law. But in certain instances of wilful mischief, which are more alarming by the high damage which attends them, or by their frequency, and the ease with which they may be done, it has been thought proper to strengthen the protection of the common law, and to deter the malicious by the dread of a higher and statutory pain. This is true of the breaking or destroying of ploughs, or plough-gear, in time of tilth; of the killing, goring, or houghing of oxen, horses, or other cattle, at the same season, or in time of harvest-labour; and of the breaking and destroying of mills; all of which offences are, by these statutes, punishable as theft, and with the pains of death. The phrase of "other cattel," which is used in the first of these laws, was, in one instance, applied to the killing of sheep; and three persons, George, Walter, and Ingram Scott, were, in consequence, condemned to die. But it may be doubted, whether this is a sound construction of that statute, which, even with respect to the kinds that are expressly mentioned in it, seems only to be applicable to the seasons of labour. Other statutes, which make the like provisions as to the killing of game, the cutting of trees, the breaking of dovecotes, and the like, were formerly taken notice of under the head of theft.

MALICIOUS MISCHIEF.

Houghing of cattle, breaking of ploughs, &c.

1581, c. 110.
1587, c. 83.

Feb. 20. 1616.

II. But by far the most important article which falls under the general head of malicious mischief, is the crime of wilful fire-raising; to which I have assigned a place in this Chapter, as ordinarily intended to do a patrimonial injury, though it may be, and sometimes, but more rarely, hath been directed against life and person too. Take it in any view, it is always a crime of the first degree; on account of the dreadful and extensive waste it may occasion, the great terror and alarm

Of wilful Fire-raising.

CHAP. IV.

Pains of Fire-raising.

alarm which attend it, the impossibility of guarding against it, and the pure and deliberate malice of the contrivance and way of execution.

THE laws of all countries have therefore consented in dooming the fire-raiser to death; as well as those of several have ordered him to perish in some uncommon and more cruel mode of execution. The Roman law, if he were a person of low condition, allowed him to be exposed to wild beasts; and in certain other cases, "*igni necari jubetur* 1." This sort of retaliation was also adopted in the laws of the Visigoths, and of some others of the barbarous nations; with respect to him at least who raised fire within a town or village. The same law was proclaimed for the German empire, by a constitution of Charles V.; and, as Carpsovius says, it was the general rule of his time in Saxony, for fire-raisers of every degree and condition 2, "*igne cremandos esse*."

Pains of Fire-raising.

B. 4. c. 6.

WITH us in Scotland, we find that the *Regiam Majestatem*, likened the crime of fire-raising to that of murder, and ordered that it should in all points be proceeded in, treated, and brought to issue as such. But not content with this severity, which had proved insufficient in those disorderly times, the Legislature, first by statute 1426, c. 75. and afterwards, more fully, by statute 1528, c. 8. raised the crime of fire-raising, at least in certain cases, to the rank of treason. "The auld lawes, (it says), shall be keeped with this addition, that quha cummis and burnis folkes in their houses, and all burninges

¹ L. 9. et 12. dig. De Incendio, &c. L. 28. No. 12. dig. De Pœnis.

² Leg. Visig. lib. 8. tit. 2. No. 1. Carpsov. quæst. p. 225.

“ burninges of houses and cornes, and wilfull fire-raifings, FIRE-RAISING.
 “ be treason, and crime of lese majestie.”

OWING, either to inadvertency, or to some reason which cannot now be assigned, this act was not printed in the Black Acts, or first edition of our statutes; which omission to supply, special order was given to print it, by the statute 1567, c. 32. And thus it happens, that in all the later editions, this law is found inferted both in its proper place, as a statute of the year 1528, and also as a renewed act of the year 1567, being the act immediately following that which gives order for the printing. But in this renewed form, the law is inaccurately given, both as being referred to the year 1526, in which there was no Parliament, and by the omission of the words “ and all burninges of houses;” whereby the sense of the enactment is maimed and confounded. This is the more material to be taken notice of, as Mackenzie in what he says of this crime, having attended only to the renewed, and not to the genuine statute, has been led into difficulties, and indeed mistakes, respecting the extent and application of the law.

Pains of Fire-raising.

BESIDE these two, there is an intermediate statute, the act 1540. c. 118., which chiefly relates to the burning of corn in stacks or barns, and on the whole seems to have been intended, not for taking away the pains of treason formerly ordained, (as Lord Royston supposed), but for disabling the King to pardon the offenders in this sort, or even to commute the lawful pains of their transgression for any thing less than banishment¹. It is not clear, that this was even meant to be a perpetual law; and we know, that it was no better observed than those other statutes which made the like

¹ See Royston's Notes, No. 10. tit. Fire-raising.

CHAP. IV.

like provisions with respect to murder, and other acts of violence to which those times were addicted.

Pains of Fire-raising.

THE pains of treason were afterwards, by statute 1592, c. 148. extended to the burning of coal-heughs. But by the act of the 7th Anne, c. 21. the last which relates to the pains of this offence, and the same which extends the English treason-law to Scotland, fire-raising, in all the instances which had been raised to the rank of treason, was again lowered to the ordinary condition of a capital offence, and was ordered to be proceeded in and tried as such.

So standing the law as to the punishment of fire-raising, let us next attend to the character and lawful description of the crime.

Crime requires actual burning.

1. WE have to remark the distinction between the proper and capital crime of fire-raising, and the attempt to commit it; which lies in this, that the fire must not only be applied, but applied with success, to that which is meant to be destroyed. Though our opinion of the offender may be the same, it is not however sufficient authority in law for passing sentence of death on him, that he has taken the last step, and done his utmost towards the perpetration of his wickedness, as by kindling his matches, and tossing them among the corn, or upon the roof of the house; if in fact his destructive purpose has not been accomplished. Probably it was on this account, that no sentence followed in the case of Barbara Phinnick, who, as appears from the proof, being left alone in her master's house, had torn a bed-quilt, and placed it under a bed, with a burning candle in the middle of it, and had then gone abroad and locked the doors, with intent certainly to destroy the house: but which purpose

June 28. and
July 8. 1670.

purpose failed to take effect, neither the bed being set fire to, (owing to a bed-tick of leather), nor even the bed-quilt being quite consumed, and the boards of the floor only beginning to be touched, when the discovery was made¹.

FIRE-RAISING.

BUT this rule equally requires to be guarded on the other side: for we should form a very false, and no less unreasonable notion of the law, if we should conceive that there is no fire-raising without the absolute and complete destruction of the thing or tenement, to which the fire is put. Certainly the crime is as much committed, if one stack in the barn-yard, or any distinct portion of the house is destroyed, as if the whole were consumed, according to the pannel's intention. This position, (if there be occasion for authorities to confirm it), is announced in the interlocutor in the case of Stuart, Mill, and Brodie, as also in that of William and Alexander Frazer².

Burning of any Part is sufficient.

July 27. 1713.

Oct. 21. 1720.

NOR only so; but in the judgment of law, the pannel shall be held to be guilty of no lower crime, though no stack
Z in

Is sufficient, if fire be raised.

¹ The jury however found her guilty "of raising of fire within the house of James Stamfield."

² "And *separatim* find their setting fire to the said house of Inchdruer, by which the same or part thereof was burned, also at the time foresaid, likewise relevant to infer the pain of death." Interlocutor in the case of Stuart, 3d August 1713.

In the case of Frasers, "Find the said William Frazer *alias* Oig, and Alexander Frazer *alias* Oig, pannels, or either of them, their having, the time libelled, wilfully set fire to Mr Patrick Robertson's barn, or corns in his barn-yard, whereby the said barn or corns, or part of them, were burnt or consumed, &c. relevant to infer the pain of death." 7th November 1720.

CHAP. IV.

in the barn-yard, nor chamber of the tenement be consumed, if, properly speaking, the fire hath once laid hold of, or been *raised* in the premises; so as to occasion alarm for their safety, and put them in plain danger of the farther progress of the flames¹. For, as the very appellation of the crime indicates, it is not the crime of burning, or destroying by fire, but of *fire-raising*; and agreeably to that stile the statute 1528 not only declares all "*burnings* of houses and "*corns*," but also that "*wilful fire-raisings*" shall be treason. If therefore the fire hath once fastened on the subject, and is only by timely discovery prevented from spreading farther, the capital offence is here committed, though no material damage has ensued. This was the description of the case of Margaret Nicolson, who was charged to have kindled fire, but which was almost instantly discovered and extinguished, in three different parts of the thatched roof of her master's house. But the prosecutor restricted his conclusions to an arbitrary pain; and the pannel agreed to be transported.

July 23. and
Aug. 16. 1711.

Fire must be
raised wilfully

2. THE only other, but an indispensable quality of the act, as being that circumstance wherein the guilt of it entirely lies, is that the fire be raised wilfully; that is to say out of malice, and on purpose to do a neighbour harm. If it be kindled *recklessly*, or from *misgovernance*, according to the phrase of the old statute 1426, c. 75. the greatest severity that can be used, beside levying the damage from the faulty person,

¹ "*Accedente periculo incendii majoris, quod facillime evenire potuisset, licet impediendo Deo non evenerit.*"

"*Absque dubio igitur pena ignis quoque reo est infligenda, si per incendium, parvum et minimum damnum illatum, et ignis eo ipso momento, dum urere ac aedes inflammare cepit, rursus fuerit extinctus.*" Carpovius, Quæst. p. 228. No. 39.

person, is to inflict a fine or short imprisonment ¹. Nor is even this censure warrantable, unless the fault be of that high degree, "*ut luxuriæ aut dolo sit proxima*," L. 11. dig. de incendio.

FIRE-RAISING.

Now, the prosecutor has peculiar difficulties to contend with, in proving this the fundamental article of his charge. In most cases of theft, murder, malicious mischief and the like, the crime leaves such vestiges behind it, as upon the first view betray the felony which has been committed. The same is not true of fire-raising: On the contrary, the outward spectacle of a wilful, and of an accidental fire, is quite the same; and indeed the more complete the success of the felony, the more thoroughly all the means of detecting it are destroyed. Excepting, therefore, in those rare cases, where direct testimony can be obtained to the very act of setting fire, the prosecutor has to surmount this obstacle, as he best may, by convincing arguments and presumptions, drawn from the circumstances of the case. It is an article of that tendency, that fire breaks out suddenly in a house which is not inhabited, or in remote parts of a building at the same time, or that combustibles are found strewed in or about the premises. But it were vain to attempt any enumeration of the particulars which may be serviceable in that respect, or to think of laying down any rule for their sufficiency, other than this obvious and general direction, that the proofs and tokens must be pregnant to prevail against the pannel, who in this, as in other cases, has the presumption of innocence in his favour. Barely to say that it is not easy to imagine,

Proof of the
wilful purpose.

Z 2

by

¹ That statute appoints banishment for three years from the burgh. But this was a regulation of police, suited to the great danger of fire in those times, when houses were mostly of wood and thatch.

CHAP. IV.

Jan. 13. 1792.

Proof of the
wilful purpose.

by what other than wilful means the fire could happen, will not, without some farther indication, be sufficient; so many are the strange accidents, and trifling indiscretions by which mischief of this sort may be occasioned. On that ground, in the case of John Ker, the jury found a verdict for the pannel.

SIR GEORGE MACKENZIE, in his chapter concerning this crime¹, seems disposed even to go a greater length, and to require a proof of the *corpus delicti* by direct testimony, or by confession of party, to the absolute exclusion of presumption. But as this passage is introduced with mention of the case of John Meldrum, tried in August 1633, the meaning may only be, and in this he is surely right, to exclude those vague and inconclusive presumptions of common fame, previous enmity, threats of mischief, and the like, which seem in that case to have been the chief grounds of conviction. The charge against Meldrum was for burning the tower of Frendraught, "of the height (the libel says), of four house "high," and in which perished the Viscount Melgum, son of the Marquis of Huntly, the laird of Rothiemay, and four of their servants, all of them guests at the time with the laird of Frendraught. Meldrum had once been an inmate of the house; and the manner of the fire was supposed to be by his tossing combustibles into a vault at the bottom of the tower, "through the slits and scores of the vault," whence the flame communicated upwards, through a square aperture, or hole in the arch of the vault, and consumed the whole of this high tower. This was, however, nothing better than a hypothesis, unsupported by any pointed proof with respect to the manner in which the fire began; and though the man may have been guilty, I must agree with Mackenzie in thinking it doubtful, whether there was legal evidence

¹ No. 2.

dence to convict him. A person named John Toshoch, a servant in the tower, and an alleged accomplice of Meldrum's, was indicted in the succeeding year; but as he had previously been put to the torture, which he sustained without confessing, and as no farther evidence had after this time been obtained against him, the Court, in these circumstances, refused to remit him to an assize.

FIRE-RAISING.

June 22. 1634.

WHERE these qualities concur, it will not materially affect the case, what the mode of executing the mischief be: Whether it be done by one person or by a mob, (as was resolved in the case of William Spence); whether the pannel kindle the fire with his own hand, or by that of others whom he procures or equips for the enterprise; or whether he apply the fire directly to the thing or tenement which is meant to be destroyed, or to something contained in or nearly connected with it, so that the one being on fire, the other is likely to kindle. If the pannel, thinking to cheat the law, shall not cast fire into the corn, but into the dry furze in the middle of the field, or immediately bounding it, or if he kindle a stack of fuel adjoining to the barn-yard, or set fire to the goods or furniture in the ware-house, he shall still be judged as a fire-raiser, if his purpose take effect, by fastening upon or consuming any part of the corn or of the building; for it is all one, as if he had laid and kindled a train of gun-powder with the same intent. The charge was accordingly found relevant in a case of this description, that of James Douglas, who having broken into a writer's chamber and stolen, wilfully placed a burning candle among the papers in a press or desk, (thinking to conceal his theft); whereby

Case of a Thing
burned, by fire
set to another.

Dec. 13. 1784.

Aug. 4. & 10.
1682.

CHAP. IV.

whereby the house was set fire to and burned. Nay, as little shall he have any defence, though the thing which he sets fire to be even his own property, if it be so situated that the safety of his neighbour's property depends on it, (being, for instance, floors of the same tenement, or being contiguous and connected buildings), and if any part of his neighbour's property is in consequence consumed. Certainly, by how much more such a deed shows a rooted and inveterate malice against his neighbour, by so much more is it deserving of the highest pains of law.

Case of Thing
burned by fire
set to another.

IN these instances, I have supposed the pannel to have had a purpose from the first, against the very subject which has in the event been destroyed. But even this may not in every case be necessary. It is the general rule which governs in the construction of other offences, and will equally apply here, that the malefactor who is actuated by a malicious purpose against his neighbour, and has meant to do him a great and felonious mischief, shall be accountable for all the consequences of his act; at least, if they are not of quite a fortuitous and extraordinary nature, but such as might naturally, and not improbably, ensue on his enterprise. If, therefore, any one set fire to his neighbour's copse-wood, or heath, or moor, with intent only to destroy that subject, (in which he does not commit a capital offence), but the fire gets head, and consumes corn and houses, and all that is in the way, he shall be punished in the same degree, as if he had intended all this ravage from the first. He showed a high dole, a depraved and wicked purpose against his neighbour, in the immediate

He escaped conviction, owing to a defect and irregularity in the way of proving his confession.

FIRE-RAISING.

mediate thing he did; that which has followed is a mischief, though higher, of the very same sort with that which he intended, and so likely to follow on it, that, when he did the other, he must have been utterly indifferent to his neighbour's interest and safety, whether this mischief also should ensue or not: So that the first purpose in such a case naturally connects with the event, and completes the capital offence. I shall put another case in illustration. If a mob break into a man's house, and pull his effects to pieces, and afterwards, the more effectually to destroy them, proceed to pile them up in front of the house, and there to burn the heap, by which the house itself is set fire to and consumed; this, without a doubt, is fire-raising, though it happen beyond their first intent.

AND here, though not strictly in the order of our arrangement, I am naturally led on to observe with respect to the offender's purpose, that if it was to burn the thing which has been consumed, the crime will not the less be fire-raising, that the doing of this particular mischief was not the ultimate, nor sole, nor even chief purpose of his enterprize. If a mob assault a gaol, to rescue rioters who are confined there, and they burn down the doors, passages, and inner strengths of the gaol, to obtain entry of the building; and of its several parts, this seems alike to be fire-raising, (and may be maintained to be so, even though they themselves should in the end extinguish the fire), as if they had no other object in coming there. It is still true that fire has been wilfully, maliciously, and feloniously, not casually, excusably, or culpably raised within this gaol, and that part of the same has thereby been consumed; and the case is only so much the worse for the pannels, if this act has been subservient to the also unlawful, and felonious transgressions.

Object of the
Fire-raising not
material,

CHAP. IV.

Maclaurin,
No. 93.

What Fire-rai-
sings punishable
with Death.

transgressions of mobbing, breaking gaol, and setting prisoners at large. Or put the case, that a toll-house is invaded, and partly burned by a mob, with the purpose of hindering the collection of the toll. It cannot be imagined that the fire-raising ceases to be such, because it is the useful, or the necessary instrument, towards that farther, and also criminal object. In the case of Maclauchlane, tried as accessory to the outrages committed by the Porteous mob, one of which was the burning the doors of the gaol, to gain admittance to their victim, this of fire-raising was accordingly libelled, among other denominations of crime. But whether the charge was meant to be sustained under that form, cannot be said upon the general terms in which the interlocutor is expressed.

It remains to enquire concerning the things or subjects, on which the capital crime of fire-raising may be committed. There can be no question with respect to those subjects, namely, houses, corn, and coal-heughs, which are specially mentioned in the statutes 1528, 1540, and 1592. And these, for obvious reasons, are certainly the possessions which most require to be guarded from this sort of injury. Neither can I find that any judgment has extended the description of the crime beyond these articles, so as to affix the same pains to the burning of woods, heaths, moorles, stacks of fuel,

Mackenzie, No. 5, says, That in the case of Suddie, the Justices refused to sustain the burning of some fuel in a muir as treason. The fact, as upon the record, appears to be, that the Advocate did not insist upon his libel to that extent, but, upon objection moved, consented "That the Justices consider the punishment." The verdict (of the 4th August), convicted the pannels only in terms of their own confessions, as burning fuel *which belonged to themselves*. Sentence was superseded, till discussion of the point of property and possession of the ground where this fuel was destroyed.

or in general any sort of moveable effects. Whatever may be true as to other modes of charge, it would not therefore be capital as fire-raising, that a mob, after riffling a house, collect the effects and burn them in the street; nor even within the house, that they burn the owner's title-deeds, bank-notes and bonds, or other valuable papers and precious effects, gathered into a heap in the fire-place, or upon the hearth.

FIRE-RAISING.

WITH respect however to corn; this subject, according to the statutes 1528 and 1540, is equally protected by the highest pains, whether it be in the field, or gathered into the corn-yard or barn. And with respect to houses, the broad terms of the act 1528, "all burnings of houses and corns," seem to be applicable alike, and practice has in fact applied them, to every sort of house, whether it be a dwelling-house, work-house, or warehouse, or a barn, stable, or other out-house; so it be what is commonly termed or understood to be a house, and not a bare hovel or temporary place of shelter. Still less is any distinction admitted in the case of a dwelling-house, according as it is or is not inhabited, or even fit for habitation at the time. The charge was found relevant in the following cases; that of Alexander Cunningham, July 30. 1677, for burning Lord Strathmore's offices and stables¹; that of William and Alexander Frasers, Nov. 4. 1720, for burning a barn or corns in the yard²;

Burning of
Corn is capital.

A a that

¹ This case is worth consulting, as an instance of presumptive probation. An ambiguity in the wording of the verdict prevented sentence of death.

² "The Lords found the saids pannels, or either of them, their having the time libelled, wilfully set fire to the complainer's barn, or corns in his barn-yard, whereby the said *barn or corns, or part of them*, were burnt and consumed, or that they or either of them were art and part thereof, relevant to infer the pain of death and confiscation of moveables." Nov. 7. 1720.

CHAP. IV.

that of Walter Buchannan, January 15. 1728¹, for burning a house, though not inhabited, or the corn and furniture within it; that of David Young, July 24. 1738², for burning a corn-stack in the yard, a barn, byre, and granaries, and two rooms of the adjoining mansion-house; all or any of which are sustained.

THERE are also these entries of conviction, of a more ancient date. William Donald and James Oliver, convicted and hanged for the treasonable burning of Sir Andrew Ker's corns. Andrew Thomson of Silver Burn "delated
 May 8. 1573. " of the burning of certain corns to Mathew Laurie:" marked on the margin, *Convict. et Combust.* William
 April 18. 1577. Brown "delated of coming under silence of night to the
 July 29. 1588. " barn of Bracoth and barn-yard thereof, and for the treasonable raising of fire in twa bear-stacks in the said barn-yard, and for burning and destroying the said twa bear-stacks, and fax ait-stacks, with the said barn, and certain
 " corns being therein." He was convicted of this charge, with the exception of the oat-stacks, and was hanged. The oldest case I have met with is entered thus: "9th February
 " 1554, *Robertus Paterson convict. de incendio et combustione*
 " *granorum de Sprouston pertinen. venerabili in Christo Patri Jacobo, &c. in mense Novembris ultimo elaps. commiss. et suspen.*"

BUT

¹ "Find, That after John Maclintock had taken possession of the said house, he the said Walter Buchanan did, at the time libelled, set fire to the said house, whereby the same, or the corns and plenishing placed there by the said John Maclintock were burnt, relevant to infer the pains of law."

² "Found, That the pannel, his having, time and place libelled, wilfully set fire to any of the houses or corns libelled, whereby the same was burnt or consumed in manner libelled, or that the pannel was art and part thereof, relevant to infer the pains of death and confiscation of moveables."

BUT is it to be held concerning those tenements which are the subjects of this crime, that they are so in all situations, and even though a material interest in them is vested in the offender himself? If the offender's interest is any thing less than the property of the tenement; as for instance if the tenant or liferenter of a house, out of malice to the owner, burns it over his own head, and perhaps part of his own effects along with it; the crime seems to be no farther altered than by the extraordinary malice of the offender, which will be gratified at any, however costly, rate to himself, and overlooks all considerations of interest and prudence. He has still wilfully burned the property of another, and in doing so, has been actuated by the proper dolo of the crime, in a more than ordinary degree.

FIRE-RAISING.
Case of a Tenant
burning House
let to him.

IN the opposite case too, of a person wilfully burning his own house, out of malice to a tenant or liferenter who is in possession of it, these considerations weigh against the pannel; that he deprives the possessor of his home and dwelling-place, and destroys that real interest which he has in the tenement for the time, as also occasions him all that personal alarm, distress and danger, which, as much as the patrimonial loss, are considered by the law in this matter, and are among the principal motives of its severity on the offence. Accordingly, this was found to be fire-raising in the case of Walter Buchannan, against whom it was one article, in a very numerous list of charges, that he had set fire to the houses of Taynlone, his own property, but liferented by Jean Dougal, (Lady Branshogle) and possessed by her tenant John MacIntock, who had placed his corn and effects in them. The pannel pleads, "That it is admitted that the house was his own property. Who then

Case of a Man
burning his own
House.

Jan. 15. 1728.

A a 2

" can

CHAP. IV.

“ can believe, *that for the sake of damaging a little a liferent-*
 “ *rix whose interest might have lasted for a month*, a man would
 “ have destroyed his own property, whereby the far greater
 “ prejudice must have arisen to himself.” The prosecutor
 answers, “ That the libel bears, that the house was possessed
 “ by the Lady Branshogle and her tenant, as will be proven.
 “ Besides the very discharge founded upon by the pannel
 “ himself, instructs that she was in the possession of Tayn-
 “ lone, it bearing that the rents of these lands were counted
 “ upon. So that *albeit the property of Taynlone did belong to*
 “ *the pannel, yet if he or any other heritor should set fire to houses*
 “ *possessed by tenants*, it would unquestionably be wilful fire-
 “ raising; and therefore this point needs not be further dis-
 “ puted.” The Lords find upon this debate, “ That the
 “ house or houses of Taynlone, *said to be liferented* by Jean
 “ Dougal complainer, were upon one or other of the days
 “ of January 1721, by fire burned down; and that some
 “ time before they were burned down, as said is, Walter Bu-
 “ channan pannel did *threaten the burning of them*, relevant
 “ to infer an arbitrary punishment. *Separatim* find, That
 “ after John MacIntock had taken possession of the said
 “ house, he the said Walter Buchannan, did, at the time li-
 “ belled, *set fire to the said house*, whereby, the same, or the
 “ corns or plenishing placed there by the said John Mac-
 “ Intock were burnt, relevant to infer the pains of law¹.”

THIS case was even thus far favourable to the pan-
 nel, that no person was dwelling in the house, to be
 alarmed or put in danger. One circumstance more can
 however be imagined, to make the situation still more favour-
 able

¹ The same question was debated in the case of John Ker, 13th January 1792; but the decision was prevented by the consent of the prosecutor to restrict his libel to an arbitrary pain. The question was rendered still nicer in that case by certain additional circumstances; of which in their place.

able to him; which is, that the tenant or liferenter is not even in possession by having his effects in the house, and thus suffers no loss but that of his real interest, which is then only like that of a real creditor or adjudger of a subject, which remains in the natural occupation of the owner. But I am now stating a case which has never yet been tried.

FIRE-RAISING.

A THIRD, and still more unlikely situation is, if a person shall burn his own house, being either unoccupied at the time, or occupied by himself. Now, if only his own house be destroyed, and if this be so situated as not even to be attended with any risk of damage to the property of others in the burning of it, and if it be set fire to withall, (if such a thing could happen), for sport only, and without any sort of malicious intention, this seems not only not to be the crime of fire-raising, but not to be any crime at all. If it is a house in a town, or is so situated that any degree of danger, or of alarm and disturbance to the vicinity, arises from the burning of it, the offender shall be liable to punishment, both in his purse and otherwise, as for a high breach of good neighbourhood and public police.

Case of a Man
burning his own
House.

A MORE unfavourable case to the offender, and of which it was left to the ingenuity of modern times to introduce us to the knowledge, is, if he insure his house at a high rate, and afterwards set fire to it, with intent to injure the underwriters. Whether this enterprise succeed or not, by recovery of the money from the underwriters, and though only the pannel's own house be destroyed; of this there cannot be any doubt that the attempt is a criminal fraud of the worst kind, and punishable with the highest arbitra-

Burning to de-
fraud Insurers.

ry

CHAP. IV.

Jan. 13. 1792.
Mar. 16. 1774.

ry pains. It was found relevant to that effect upon the Lord Advocate's restriction of his libel, in the case of John Ker. And in the prior case of Thomas Muir and James Cant, which is our first, and only other case of that sort, the pannels, after some debate upon the question, and in pursuance of their own petition, were adjudged to be transported.

BUT in this way the two main controversies still continue undecided: First, and which is attended with the greater difficulty, whether such fraudulent burning of a person's own house be a capital fire-raising: And secondly, which may seem more probable, whether when a person, thus fraudulently setting fire to his own house, happens also to burn his neighbour's house, or part of it, this is a capital fire-raising, by reason of the highly criminal and kindred nature of the original intent. The decision of a third and still nicer question was prevented by the restriction of the libel in the said case of Ker. For the charge against him was, that having insured a tenement of houses, his property, and partly occupied by himself, partly by tenants, he, in order to defraud the insurers, had set fire to the part possessed by himself; whereby the whole building, being all under one roof, and part of his tenants effects along with it, were consumed. Thus the case involved the triple question, of burning his own house in the occupation of a tenant; of burning it by connection only with another possessed by himself; and of setting fire to that one with intent only to defraud. With respect to property in ships, the doubt has been removed by the late statute, 29th Geo. III. c. 46. which makes it a capital offence to burn, or otherwise wilfully to destroy, any insured vessel, with intent to prejudice the underwriters, or others concerned.

THE

THE convictions of fire-raising are not very numerous, and are mostly of an ancient date. On the 13th May 1609, Sir James Macconnell, for burning the house of Alkomell, and breaking the King's ward in the castle of Edinburgh, had sentence of death and forfeiture. On the 14th June 1615, John Henry, for setting fire to the coal-heugh of Little Fawside, was sentenced to be beheaded, and his head to be set up upon a pole at the heugh. As also, Andrew Stewart, Alafter Stewart, and others, for burning the standing corn, barns and houses on the lands of Ballindalloch, were sentenced to be hanged, and their heads to be struck off and placed upon the West Port of Edinburgh. Fire-raising, indeed, is one charge, among others, which commonly occurred in the libels against Highland robbers and depredators; as in that against Alafter More Macgregor, &c. who, for burning the house of Belchirie, belonging to Lyon of Muireisk, was doomed to die, to have the right hand struck off, and to be hung in chains.

FIRE-RAISING.
Convictions of
Fire-raising

Mar. 18. & 19.
1631.

May 7. 1668.

III. So much shall suffice for the proper and capital crime of fire-raising, which is only committed upon property of certain sorts. But our view of this part of the law will still be incomplete, unless the following things shall be attended to.

Inferior acts of
Fire-raising.

1. To destroy in this way any of the other sorts of property, moveable or immoveable, is always a heinous crime, and punishable on every occasion, at common law, with the highest arbitrary pains.

2. IN this instance, as in some others, where the crime is attended with high danger and alarm, and indicates the extreme depravity of the offender, even the unsuccessful attempt

Attempt to raise
fire is punish-
able.

CHAP. IV.

tempt to commit it, "*si devenit ad actum proximum*," is accounted a point of dittay, and for the sake of example, as well as in order to amend the offender, or at least to deter him from any renewal of his wickedness, may be repressed by a suitable and severe correction. Interlocutor was given to that purpose in the said case of Walter Buchannan, upon the charge of casting a kindled peat into a house, with intent to burn the tenement¹.

Threats to raise
fire are punish-
able.

3. BUT even a greater latitude than this has been taken, and relevancy been sustained upon more remote acts of preparation for the crime, nay, upon the bare threatening to commit it. The very uttering of such threats is itself considered as an outrage and injury, by reason of the alarm and loss of peace which may attend such denunciations, when violent or frequently repeated.

April 5. 1686.
June 7. 1712.

A CHARGE of this sort was sent to the assize, in the case of Grizzel Sommerville², and in that of the Laird and Lady Grant³, in neither of which any actual damage had been done;

as

¹ " Find, That at the time libelled, in the year 1723, when the said houses
" were in the possession of John Montgomery, he the said pannel having attempted
" by himself, or others of his outhounding, to kindle a fire to the said houses,
" *separatim* relevant to infer an arbitrary punishment."

² " And sustain the reiterated threats of offering to burn the house, and to kill,
" as mentioned in the libel, relevant to infer an arbitrary pain."

³ " The Lords find the said Ludovick Grant, his threatening to burn the house
" of Castlegrant, or the charter-chest or writs therein, or the breaking the door
" and

as also in the case, already quoted, of Walter Buchannan ¹, where a burning ensued. And again, in the case of Patrick Hepburn, where also a fire had followed soon after the threats, the Court decerned the pannel to find caution as in law-borrows, but under an extraordinary penalty, (for to such a case of *proof and conviction* of malice, the statutory limitation of the surety will not apply), "in respect that two of the threatenings sustained in the interlocutor against the pannel, are found proved."

FIRE-RAISING.

Mar. 9. & 12.
1714.

SUCH being our practice as to threats, much more will we be jealous of all approaches towards the perpetration of the act, by soliciting or exciting others to commit it, even though they refuse to be concerned; for if they comply, and fire is raised in consequence, and the instigation can be shown to have been the motive of the actors, then the author of the counsel is art and part of the capital offence. The instigation is therefore laid as a separate offence in the libel against William and Alexander Frazer; and it is, *separatim*, found relevant to infer an arbitrary pain, "the said pannels, or either of them, their having invited or solicited others to have set fire to the said barn, or corns in the barn-yard." These subjects had actually been destroyed, but not by the

Nov. 4. 7. 8.
and 14. 1720.

B b

persons

"and iron bars of the charter-house, where the said charter-chest and writs were, since the disposition by him to his son, relevant to infer an arbitrary punishment."

"They find, That the house or houses of Taynlone, said to be liferented by Jean Dougal complainer, were upon one or other of the days of January 1721, by fire burned down; and that some time before they were burned down, as said is, Walter Buchannan pannel, did threaten the burning of them, relevant to infer an arbitrary punishment."

CHAP. IV.

persons solicited, who are stated in the libel to have refused. Upon verdict convicting in terms of this part only ¹ of the interlocutor, both pannels were banished to the plantations for life.

¹ " But find the third part, from which the Lords infer an arbitrary punishment, proven against both pannels." 8th November 1720.

CHAP.

CHAPTER V.

OF FALSEHOOD AND FRAUD.

IN this chapter, we are to have before us a great variety of transgressions, all of which are, however, naturally reducible to the one head of FALSEHOOD, or *crimen falsi*; a point of criminal accusation thoroughly established in the Roman law, whence, at a remote period, it had been translated into that of Scotland. Among the different species of this comprehensive class, let us first attend to that sort of falsehood, the most frequent and the most dangerous of any, which is committed by the falsification of writings, and which in the style of modern practice, (for it was not so anciently), has been distinguished by the appellation of Forgery.

FALSEHOOD.

I. IN discoursing of forgery, it will be convenient to invert our usual order, and to turn our attention in the first place to the pains, instead of the description of the offence; because, without frequent reference to the former, the several stages and degrees in the falsification of writings can scarcely to any advantage be explained.

Of the Pains of Forgery.

B b 2

AND

CHAP. V.

AND, first, I shall take up our numerous statutes concerning falsehood, which, if clear and decisive, would relieve from the trouble of any farther investigation. But on looking into these, of which the following are the chief, 1503, c. 64.; 1540, c. 80.; 1551, c. 22.; 1621, c. 22.; it will be found difficult to discover any certain warrant in them for inflicting that ultimate punishment, which is, however, well known to be the ordinary consequence of the higher species of falsehood. As far as any of these laws are special, they rather afford an argument the other way; in as much as they enumerate only inferior pains, such as banishment, and dismembering of hand or tongue, and, in their more general expressions, consist only of a reference to the pains of the canon and civil laws. Now, the inflicting of death was not, in any instance, within the province of the spiritual courts. Neither does it appear, that in the civil law, the falsification of writings, nor indeed any other sort of falsehood, was punished with this severity, except in a slave, or in the case of false coining, which fell under the *Lex Julia Majestatis*, or in the case of him, who, as a witness, or as a magistrate, had been the cause of the death of an innocent person, and might therefore, as a murderer, be judged on the *Lex Cornelia de sicariis*. The stated and ordinary pain of falsehood in a freeman, was deportation, and confiscation of goods¹.

Of the Pains of
Forgery.

NOTHING is, however, proved by a longer train of coherent and authentic evidence, than that, according to the course of custom in this matter, to which those statutes refer, and

¹ Dig. lib. 48. tit. 10. l. 1. No. 13.; Ibid. tit. 8. l. 1. No. 1: Cod. 9. tit. 24. l. 2.

and by which, as far as they are doubtful, they have been explained, our Judges possess a discretionary power of punishing this sort of falsehood *pro modo admissi*, and of applying the highest pains to it in those cases, where either the wickedness, or the danger of the act, requires the example of such severity. As this, on some occasions, has been a point of controversy, I will briefly submit to consideration some of the most remarkable of the judgments to that purpose.

FALSEHOOD.

THE oldest instance that I have met with, is that of Sir John Crawford, notary, who had sentence of death on the 16th July 1573, for the stealing of a certain writ from Mary Millar, and forging an instrument to the prejudice of the same person¹. James Merchieston had the like sentence, on the 11th December 1579, for the inventing and feigning of a pretended obligation of the laird of Carnbee. Soon after came the case of Adam Ramsay and Alexander Adam, who were both hanged "for the falsifying, feigning and " inventing of ane false instrument of seisin of ane tene- " ment of land lying in the burgh of Perth." The next to this is the case of John Halliday burgess of Edinburgh, Thomas Marjoribanks notary, James Lowrie, John Winzet baker to his Majesty, and Alexander Lowrie baxter in Edinburgh, who, on the 8th February 1597, had all of them sentence of death, for their several concerns in certain forgeries.

Of the Pains of Forgery.

April 15. 1580.

¹ I find before this, various examples of arbitrary pain; of which it was ordinarily a part, that the hand was struck off, as ordered by the statute of Alexander II. c. 19. David Sechye, notary, for forging an assignation, was banished, declared infamous, and had his right hand struck off; 5th May 1558. Andrew Drummond, for forging a charter, had the like sentence; 18th May 1556. As had Thomas Barry, 6th November 1570, for forging the subscription of the Earl of Lennox, regent, to diverse letters and grants. MS. abbt. in Adv. Library.

CHAP. V.

Feb. 15. & 16.
1600.

geries. On the same day, John Moscrop had the like sentence on a separate charge. Another striking example followed a few years after; when Finlay Ferne, James Tarbat writer in Edinburgh, and Robert Innes notary, were also condemned to die for their several parts in one false transaction. Indeed, it appears that about this period the thing had been in flagrant practice; in so much that his Majesty, in a letter to the Advocate, which is entered in the books of adjournal, commands that officer diligently to enquire after and pursue all offenders in this kind.

Of the Pains of
Forgery.

EVEN these examples, severe as they were, had not however been attended with the immediate effect of repressing the evil. The following persons were all condemned to die, for false writings of different kinds, in the course of the next twenty years. William Norval, schoolmaster of Cockpen, June 9. 1602; David Donaldson, December 12. 1611; Alexander Cook, Sheriff-clerk of Berwickshire, December 20. 1616; John Muirhead, notary in Tweedmouth, Nov. 17, 18. 1617; Dempster of Muireisk, April 20. 1620; and John Watson, July 11. and 16. 1623.

Feb. ult. 1650.

THE next trial that came to a capital issue, is that of William Blair notary, and Thomas Lawson, messenger, in 1650; and it deserves particular attention. On the 26th and 28th of February, these persons were convicted, Blair of forging, and Lawson of using a discharge of a bond of L. 20 Scots; Blair was farther convicted of forging a bond for L. 320. On Lawson, the Court, by direction of the Privy Council, pronounced sentence of pillory, infamy, and banishment. With respect to Blair, the Justice-depute offered a supplication to Parliament, setting forth his conviction, and praying advice concerning the lawful and proper sentence to be

be passed on him. Instead of deciding on it directly themselves, Parliament remitted this memorial, for more mature consideration, to a committee of their number, the most qualified to judge of such matters, whose report was thus: " That having considered the within supplicatione remittit " to thaim, togidder with the instructiones thereof, and actis " of Parliament and criminal practiques puniching the com- " mittirs of falsett with death, doe find the within men- " tionat William Blair to deserve the punichment of death " for several actis of falsett, and forgerie of fals writs, " mentionat in the within supplicatione, and at length con- " teinat in ane decreet of the Lords of Counsell and Ses- " sione." On the 7th of June, the Estates of Parliament approved of this report, and ordained the Justice to proceed to minister justice on the convict. In pursuance of which direction, Blair had sentence of death upon the 8th. Here then is an expresse and solemn judgment of Parliament, given upon review of the whole matter, statutes and course of practice, and for the very purpose of fixing the point in all future time.

FALSEHOOD.

June 6. 1650.

NEVERTHELESS, the question was again stirred, upon the words of the statutes, in the case of Alexander Kennedy, where the libel concluded " for the pains due to the com- " mitters of falsehood, whilk by the constant practique of " this kingdom is the pains and tinsel of life and moveable " estate." The Justice sustained the libel as laid; and Kennedy being convicted, was adjudged to die. In like manner, the libel against William and John Rutherford, engrosses the act 1621, c. 22. and sets forth in connection with it, " That by the municipal law and practique of this " kingdom, the pain of death, and the escheat and confis- " cation

Of the pains of
Forgery.
Feb. 11. and
Mar. 12. 1663.

Nov. 12. 1677.

CHAP. V.

" cation of moveables, are the pains due to the committers
" of falsehood." These persons also were convicted, and
suffered death. There followed in the same century, the con-
viction and execution of Dr John Elliot ; in January 1694.

NOTICE may farther be taken of these capital convictions,
of a later date. The case of Mungo Strachan and William
Hunter, February 2. and 3. 1708 ; of Margaret Nisbet, Feb-
ruary 1. and 3. 1727 ; and of George Mackerracher, Februa-
ry 19. and 21. 1788 ; in both of which last cases, judgment
was given after debate on the point. Nor are these to be
passed over, in which a capital relevancy was found, though
conviction did not follow: November 19. 1705, John Howie-
son ; and Andrew Adam, February 20. 1710.

THESE, too, are exclusive of the many capital judgments,
in later times, for the forgery of bank-notes, which have
all proceeded on the ground of common law, without aid
of any statute in that behalf. The following persons
have had sentence of death for that offence: Robert Fle-
ming, February 12. and 19. 1711 ; John Campbell, March
and April 1731 ; John Young, November 14. 1750 ; John
Raybould, January 18. and 19. 1768 ; William Herries, April
24. 1770 ; David Reid, August 12. 1780 ; John Macaffee,
November 1782.

Of the pains of
Forgery.

THERE is thus scarce any point of our criminal practice,
which rests upon a longer train of precedents, than this of
capital pain applied to the crime of forgery. But although,
speaking in the general, the competency of this course of
judgment will not admit a doubt, it is not, however, meant
to be affirmed, that the Court have therefore an unlimited
discretion in this matter, so as to punish capitally in every
instance of false writing whatsoever. On the contrary, in
terms

terms of their own custom and course of practice, by which chiefly the statutes have been expounded, so as at all to permit the pronouncing of such a sentence, this power stands limited to certain the more audacious and dangerous modes of falsification of writing, and could not now be warrantably extended to other modes, which have not hitherto been thought deserving of the highest vengeance of the law. What those modes are, we shall now proceed to enquire, and to ascertain at the same time the material characters of this offence, as well in general, as in those its more criminal kinds.

FALSEHOOD.

II. THE most undoubted mode of capital falsification of writing, is the felonious making and publishing of a writing, to the prejudice of another, as the *signed instrument* of a person, who in truth has not subscribed it. Some have even thought that it is only to this mode of falsehood that the term of forgery properly applies; and certainly on account of the facility, the danger, and the flagrant impudence of such an attempt, in which one man presumptuously assumes the person, and acts in the name of another, it is the object of the peculiar averfion and jealousy of the law.

Forgery of Writings defined.

I. To ensure the success of such an enterprise, the offender commonly proceeds by imitation of the hand-writing of the person, to whom the deed is ascribed; so that it may pass unsuspected by favour of that resemblance and deception. And where this course has been taken, it will, without a doubt, be no objection to the charge, nor to its relevancy for the highest pains of law, that the pannel is deficient in skill, or in attention, and has executed the imitation in so blundering and awkward a manner, as almost to insure his detection; misspelling the name perhaps, or

Imitation of Hand, how far necessary.

C c

omitting

CHAP. V.

omitting part of the subscription. A blunder of this kind happened in the case of Margaret Nisbet in 1727; who, in forging a bill on the Duchess of Gordon, who was not a Peeress in her own right, had omitted the Christian name. Such mistakes, like the want of the water-mark on the paper of a forged bank-note ¹, do not alter the dole or depravity, but only the prudence of the purpose; which is quite a separate consideration.

May be forgery
without imita-
tion of Hand.

2. BUT although this, of counterfeiting a man's hand, be an ordinary, it does not however seem to be a necessary circumstance of the capital offence. For there are several situations, in which, without employing that expedient, the offender equally gives out and publishes a writing as the deed and signed instrument of a person who knows nothing of it; and in which he not only accomplishes the same end, but does so, substantially, through the very same mode of imposition, and one which proceeds from an equal depravity of purpose. Thus, if money be obtained by the false acceptance of a bill, in name of one to whom it is specially addressed by name and description, and who is a person of known credit; this seems to be not the less a forgery, and a capital crime, that this person never could sign his name at all ². It is still true, that the offender has made a false deed for him, and in his name, and that he has done so, not by any
fort

¹ The Twelve Judges of England found that this was no objection in the case of James Elliot, 21st July 1777. Leach's Cases, No. 87.

² A charge of forgery was made upon an allegation of this sort, *inter alia*, against John Robertson, of the 9th December 1709. The Lords, on the whole circumstances of that case, found the libel not relevant. But no objection was moved on the ground of two of the receipts being forged in name of persons who could not write.

FALSEHOOD.

sort of alteration, corruption, or other evil practice upon a writing which that person had signed, (for any of these is a different *mode* of imposition), but by the bold device of assuming his person, signing his name for him, and producing and passing *as his genuine signed writing*, that to which he never set his hand. That in these circumstances the falsehood was more likely to be detected, (for the objection comes to no more than this), is quite an extraneous consideration, and nowise alters the substance, nor lessens the guilt of that which is done. Farther, as the complete crime does not in any instance depend on the success of the device in the obtaining of money; so it will still be forgery, though this bill, as may probably happen, should be stopped on the very first attempt to use it.

NEITHER does there seem to be much distinction between such a case and this: that one who has got possession of a bill, which stands indorsed to another person of the same name and surname, but who is of better credit, and is fully described in the indorsement, transfers and indorses this bill to some third person, who pays him the value, believing him to be the person described in the preceding indorsement. For, though he sign his own name and surname, and do not counterfeit the hand of the true creditor; still he signs for, and assumes the person of that man, and in his name utters the bill, which is taken upon the credit of that name, and may be farther circulated by means of it, to such as are not acquainted with the hand.

It would be quite a different case, if one who has found a bill blank-indorsed, should, on getting payment of it, grant receipt or indorsement under a pure *fictional* name. For in such a case, not only does the offender not presume

Cases of Forgery without Imitation of Hand.

CHAP. V.

Feb. 2. 3. & 5.
17c8.

to sign for another existing person; but the credit is here given to the offender himself *personally*, as an individual, without any regard to the name which he assumes, or any reliance on the character, sufficiency, or description of any other man. Though signed with a fictitious name, the instrument is yet taken and received as the instrument and security of him, the very person who tenders it, and no other. Though criminal, this act is therefore not a proper forgery. There is a situation, different from either of these, and which holds a middle place between them. This is where the forgery is of the name of a person who never existed, but to whom at the same time a certain *character and description* is attributed, such as is a natural means of obtaining credit, and may have the effect of procuring money. A charge of this sort, along with others, appears in the libel against William Hunter, and is to this purpose. Hunter had obtained confirmation of Margaret Guine, *spouse of John Hodge, as executor to her deceased brother Robert Guine*, who was creditor, by certificate, to the African Company. In truth, there was no such person as Margaret Guine: John Hodge was not alive but dead, and the name of his relict was not Margaret Guine, but Agnes Crawford. Hunter proceeded to forge an indorsement, in his own favour, of the said certificate, in name of John Hodge and Margaret Guine; and this he presented for payment, but, as far as appears, without success. This entire charge was found relevant, and the pannel, having confessed, was condemned to die. But the question was not debated; and as the forgery of Margaret Guine's name was combined with that of the name of John Hodge, a real person, and likewise with a separate and capital charge, (of which afterwards), the case cannot perhaps be cited as a precedent.

THIS

THIS point of doctrine may be farther illustrated thus. There are two ways in which the law of Scotland allows a person to subscribe; by his own hand if he is capable, and otherwise by the hand of notaries, to whom he gives mandate, and in presence of witnesses, who sign along with the notaries. Now, if it should happen, (though, fortunately, such a combination is far from likely), that the due number of persons conspire to frame a false deed of this last sort, for a person who cannot write, they have it in their power to accomplish their purpose without any imitation of hands, and, in one sense, without even any false subscription; by signing, each of them his own name, in their respective capacities of notary and witness, but *falsely* relating and affirming a mandate so to do. Now, substantially, this is the very same thing, and as much or even more worthy of a capital pain, as when John signs the name, and counterfeits the hand of James. In truth, these notaries *do* sign the name of another man; that is, in the way, wherein law allows persons in his condition to sign: and whether the appearance of a genuine and authentic deed is given to a false one in the one way of subscription or the other, there seems to be no reason for distinguishing; since the substance,—the wickedness, and the effect of what is done, is the same in both situations. This is not a fictitious case; for sentence of death passed on Mungo Strachan notary¹, and William Hunter, for the execution, in that way, of two false deeds of factory, in name of persons deceased.

FALSEHOOD.
Forgery of
Deeds signed
by Notaries.

Feb. 2. 3. 5.
1708.

Of

¹ Strachan was not concerned in the other acts above mentioned, charged against Hunter, and which were laid in a separate libel of the same date. So that he had sentence on the single ground of his falsehood as notary.

CHAP. V.

Forgery by false
Mandate to No-
taries.

Dec. 12. 1611.

OF a nature nearly allied to this, and depending on the same notion of the offence, is the no less improbable, but also real and adjudged case, of one man personating another who cannot write, and thus imposing upon notaries, to whom he gives mandate to sign for him whom he personates, and who is to them unknown. This is the description of the case of David Donaldson. Who, having got into the confidence of one Alexander, an old, bedrid, and facile person, and blind of one eye, and having made use of this situation to purloin the man's effects, and among other things two bonds for money, fell upon this device, for enabling him to recover the contents. He employs a notary, as if by Alexander's desire, to draw an assignation in favour of him, Donaldson, of all Alexander's effects, and in particular of these bonds. Which being done, he carries this notary and another, along with sundry honest witnesses, but all of them strangers to Alexander, to a house in Leith, where they are shown Alexander, (as they believe), lying ill in bed, and with a patch on his eye and cheek. After hearing the assignation read, this person gives mandate to the notaries to subscribe it for him; which is accordingly done. In truth, this person was not Alexander, but one John Henry, a cobbler, and an associate of Donaldson's, whom he had seduced to join in the plot. The instrument being thus obtained, without any manner of wrong on the part of any one whose hand appeared at it, and Donaldson, out of impatience to reap the fruit of his villany, proceeding to do diligence upon the bonds in Alexander's lifetime; the truth comes to light, and he is tried and convicted, and has sentence of death.

EXTRA-

EXTRAORDINARY as this case is, it is not, however, single of its kind. John Watson in Barnhill, had in like manner sentence of death; having fraudulently inserted the name of John Coutts in a bond as cautioner for him, "and thereafter, deceitfully bringing another man to John Craig, notar, "and making him to name himself John Coutts, and so gave "command to the notar to subscribe." Now, the device employed in these instances, in this leading character entirely agrees with the more common one of the imitation of hand-writing, that it is the false assumption of the person of another *in the act of signing a deed*; and whether this be done by the forger's taking the pen into his own hand, or by his authorising, under a fictitious person, the pen of another, according to the form by law allowed, seems to be immaterial to the guilt of the case; if it be not that the latter is the bolder, more deliberate, and more complicated artifice of the two.

FALSEHOOD.

Forgery by false
Mandate to No-
taries.
July 11. & 16.
1623.

3. ACCORDING to the principle which has ruled in these cases, a question may seem to arise, whether a capital forgery may not even be committed by subscriptions of so irregular a kind, as scarcely admit forgery in the way of imitation of hand, but to which, in some instances, the civil court have however paid regard in patrimonial questions. As if one man shall assume the person of another, and in his name draw money which he has right to, and shall put his mark to a receipt or promissory note for the sum, and authorise the payer, in his presence, to write his assumed name and designation, in the usual manner, round the mark. Or if he shall present a bill, bearing acceptance, by mark or initials, of one who is in good credit, and shall bring an associate along with him, who personates this acceptor, and confesses

Forgery of Sig-
nature by Mark
or Initials.

CHAP. V.

confesses the subscription, such as it is; and shall thus draw money on the bill, under the credit of this false acceptance. No case of this character has yet been tried in our Courts. And though in the English it has more than once been decided that such a device is forgery, and falls under their statutes in that behalf¹; yet this may not afford a certain inference with respect to our law: Both because something may depend on the binding power of such instruments in civil matters, according to the practice of the two countries, and because the frequent instances of fraudulent device, which occur in the more lucrative and corrupted market of that kingdom, have led to a broader construction of the crime of forgery, in general, in their Courts, than ours have yet been accustomed to.

Falsc Deed
above a genuine
Subscription.

THESE cases also are difficult, and may be the subject of different opinions. The case of a genuine subscription torn from one deed, and pasted or affixed to another, in such a manner as not easily to be discovered. And the case of a bill or promissory-note, drawn above a genuine subscription, but which stood at such a distance from the original writing to which it had been affixed, as to allow this fraudulent operation. In one sense, the subscription may be said to be genuine; yet it is no less true, that the act of signing, as relative to this bill or note,—the application of the person's name

¹ This was the opinion of nine of the Twelve Judges, on the case of Elizabeth Dunn, in September 1765, who had personated a sailor's widow and executrix, and on the credit of that character, had got an advance of money, for which she gave a note in the same character and signed with her mark. Another judgment to the same effect was in the case of Fitzgerald and Lee, who forged a seaman's will, signed with his mark, and thereupon obtained a probate, and a ticket for payment for certain arrears of wages. Leach's Cases, No. 31. No. 9.

name to this particular use, is the pure act and fiction of the offender. Accordingly, if ancient practice is to be followed, this also shall be judged to be a forgery; for we have a strong precedent of capital pain applied to a charge of this description. I allude to the case already mentioned, of Halliday, Lowrie, and others, against whom the *first* and principal charge was thus: That having got a blank paper from Captain William Nesbit, signed with his name, and intended to be filled up with a decree-arbitral, they falsely filled up the paper with the discharge of a bond of 1200 merks, due to Nesbit by Lowrie¹. No doubt seems to have been entertained that this was a capital charge².

FALSEHOOD.

Feb. 8. 1787.

I HAVE not, however, found any precedent which determines this other, and important question, Whether a capital forgery is alike committed by counterfeiting the hand of witnesses to a true instrument, as the hand itself of the alleged granter of the deed. Certainly in either case a subscription is counterfeited, in order to authenticate a deed, and an instrument is thus rendered *ex facie* valid, and such as cannot without a proof of forgery be taken away, instead of being, (as otherwise it would be), *ex facie* null, and liable to an absolute exception in law; so that the operation is to the material prejudice of the person subscribing.

Names of Witnesses forged to a true Deed.

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¹ The case is printed at large in the Appendix.

² It appears from the libel and debate, in the case of Robert Binning, July 2. and 3. 1662, that he had before undergone some arbitrary punishment, for writing a false charge to set himself at liberty when in prison, and attempting to authenticate it (which was a high contempt), by the Signet, conclusion, and subscription, which he had torn from an old letter to the Signet. But the circumstances of that prior trial (if there was one), do not appear in the record.

CHAP. V.

The difficulty is, that the instrument is not false in the fundamental matter, the subscription of the party who is meant to be taken bound, but only in the form and manner of that subscription, which are but a quality of the deed. Yet it is such a quality, that our law holds the writing, in all matters of importance, to be the same as none without it; and as subscriptions are counterfeited in order to avoid an objection which would otherwise be as fatal to the deed as the want even of the granter's name, so it may be plausibly argued, that such a charge ought to be sustained. But on this head I will not presume to offer my private opinion.

Names of Witnesses forged to a deed false *in gremio*.

Feb. 8. 1597.

THE guilt of the case rises higher, if beside the false subscription of witnesses, there is falsehood committed in the deed itself. As if a bankrupt, wishing to favour one of his creditors, conveys certain lands to him in security of his debt, and antedates the deed, to elude the law against such preferences, and being unable to find trusty witnesses for his purpose, forges the names of persons in that capacity. This was the nature of the *second* charge against James and Alexander Lowrie, and John Winzet, who, for some undue purpose, antedated sundry assignments, and forged the names of three witnesses, to support them. It has been mentioned that these pannels had sentence of death; but not upon conviction of this single charge¹. A still stronger case, and which without a doubt is capital, is, if a notary draw an instrument relating seisin which he never gave, and forge the names of witnesses to lend it faith. For not only the names of these witnesses are false, but also the whole instrument is a fiction; and in its own nature such

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¹ The libel is printed in the Appendix.

an instrument is as much the deed and attestation of the witnesses, and is as much published in their names, as in that of the notary himself.

FALSEHOOD.

4. LET us next enquire concerning the sort of writings, of which a capital falsehood may be committed in this way, what they must be in respect of form, and what in respect of tenor and substance.

Of what Writings Forgery capital.

THE form will not detain us long. For in this matter our practice does not distinguish, but holds the forgery to be a capital offence, whether the writing be in the form of a solemn and regularly attested deed, in which the hands of party, writer, and witnesses, are all counterfeited, or in that of a holograph writing, or though it be even a naked and unvouched subscription, such as the acceptance or indorsement of a bill of exchange. Indeed, I do not observe that this has ever been disputed, excepting in the one case of Raybould, tried for the forgery of bank-notes, where it was objected, that the capital crime could not be committed by the counterfeiting of unauthenticated subscriptions, such as the names of the officers of the bank. This plea was over-ruled.

Jan. 18. & 19.
1768.

NEITHER have I found any thing in the record, to countenance the opinion, which in itself seems not to be sound, that the false writing must be drawn in such a shape, as would render it, if true, a binding and unexceptionable voucher in law. If, beside the falsehood, it labour under defects in matter of form, or of regular execution, which might furnish an attentive or skilful observer with an exception to it, this does not take away the falsehood, does not alter the scope, nor lessen the wickedness of the offen-

Must the Writ be otherwise good in Law.

CHAP. V.

der's purpose ; nay, may not hinder it to be successful, and indeed does not more affect the chance of success, than the dissimilitude of the hands, or a blunder in the style of the deed, which, while they expose the fraud to detection, are however no obstacle to the inflicting of the ordinary pains. In general it is not the rule of law with respect to any crime, (for it would be a great encouragement to offenders), to deny that it has been committed, because by a higher degree of circumspection on the part of the injured person it might have been prevented ; if he has done nothing to facilitate or tempt to the commission of it. The offender shall therefore answer it, as for a forgery, though he have used ordinary instead of stamped paper¹, or one sort of stamped paper instead of another ; or though in forging a solemn deed he have omitted to design the writer, or have given the witness one name in the testing clause, and another in the subscription ; or, which is only a higher blunder of the same class, though he adhibit a naked subscription of party, without witnesses, to a deed of that importance, which would not be binding by even a genuine subscription of this unceremonious fashion. How defective soever the writing in all these instances, the contriver still made it as good as he could ; published it as genuine, and purposed to deceive by means of it ; though his knowledge of the forms of law has not enabled him to execute it to the best advantage : as neither might the party concerned have had sufficient skill in these, to defend himself from the attempt, or discover the objection. I do not find that any pannel has ever resorted to such a plea.

TOUCHING

¹ This was the opinion of the Twelve Judges of England upon the case of Hawkeswood, in Easter Term 1783, and in that of John Lee, January 1784, both of them cases of bill forged upon unstamped paper. Leach's Cases, No. 119.

TOUCHING the subject also, and tenor of the false deed, little distinction seems to be observed. At common law, forgery may be committed, either of a private writing, or of one of a public and official nature, such as an extract, a notorial instrument, or any certificate pertaining to matters of revenue, which the officers of that department, in the course of their duty, or in compliance with a statute, have to grant. Among private writings, it is not confined to those, which, like bills, bonds, or bank-notes, are calculated for patrimonial profit, but equally takes in all such as tend to any purpose of personal security, or revenge, or other gratification or advantage, in itself of a grave and serious nature, and by the pannel deemed material enough to be compassed in this way.

I PASS over, for the present, such proofs of this rule as are in the ordinary course of practice, and confine myself to the following examples. John Halliday had sentence of death for forging the discharge of a bond of 1200 merks, and an inhibition proceeding upon it. James and Alexander Lowrie, and John Winzet, for their several parts in that same act, and for the forging of sundry assignations to bonds. James Tarbet and Finlay Farme, for their respective parts in forging a charter from a subject superior, and the relative feisin. Robert Binning, writer in Edinburgh, for forging letters of suspension; having, in the course of that operation, counterfeited the Signet, and the hand-writing of one of the Judges, of the clerk to the bills, of a writer to the Signet, and the keeper of a record. Mungo Strachan and William Hunter for forging two deeds of factory. Dr John Elliot ¹ for forging and using an acknowledgment of the

FALSEHOOD.

Of what Writs Forgery is capital.

Feb. 8. 1597.

Feb. 16. 1600.

July 2. and 3. 1662.

Feb. 2. and 3. 1708.

Jan. 15. 16. and 31. 1694.

¹ Jan. 15. 1694. " They find the pannel's forging or using, or being art and " part of forging or using the receipt of the poison libelled, relevant, *per se*, to " infer the pains libelled," which were the pains of death.

January

CHAP. V.

Feb. 1. and 3.
1727.

the receipt of poison from an apothecary, with intent to fix a charge of attempt to poison upon an innocent person. Margaret Nisbet¹, for forging, *inter alia*, a declaration in the name of George Henderson, tending to fix (and which had nearly answered that purpose), the suspicion of forgery upon him. Again, on the 19th November 1705, capital relevancy was found against John Howieson for forging the acceptance of a bill of exchange; and, on February 20. 1710, against Andrew Adam for forging a bond of caution in suspension².

THIS

January 25. 1694. " Finds the forging of the receipt of the poison libelled, " by the pannels or either of them, or contriving thereof, or fraudulent using " of the said receipt, or being art and part thereof, relevant to infer the pains of " death libelled." This is the interlocutor on the libel against Nicolson and Maxwell, the other actors in the same plot. All the three suffered death.

¹ " The Lords find, That the pannel, the times libelled, being guilty of forging the bill, and obligation or declaration libelled, or that the pannel was art and " part thereof, relevant to infer the pains of death and confiscation of moveables."

² " Find, That the pannel's actual forging, or his causing and enticing others to " forge, the subscriptions to the bond of cautionry libelled, or his actual giving in " of the same with his own hand to the Bill-chamber, to obtain a suspension, relevant to infer the pains of death."

In the case of Patrick Gordon, for forging a bond of caution in law-borrows, (11th and 20th November 1706), the libel concluded for the *pains of law* and damages, and the Court found it relevant to infer the pains libelled. This trial did not proceed.

Libel was remitted to an assize against John Howieson, minister of Cambuslang, for treasonably sending to be printed, and against Robert Waldegrave, the King's printer, for treasonably printing a false, adulterate, and altered act of Parliament, instead of the true and genuine act, passed in 1592, and entitled " for abolishing " the

THIS also is to be remembered, with respect to the forging of bills, bonds, and other documents for money, that the small amount of the sum, though it will sometimes serve as a plea to mitigation of the pain, does not affect the style, nor in strictness, the capital conclusions of the charge. It was on this ground, that George Short was refused the privilege of bail, (18th Nov. 20th Dec. 1765), whose commitment was on the charge of forging a bill for the sum of L. 2, 5s. ¹.

FALSEHOOD.

5. OUR description of this sort of falsehood leads us, in the next place, to observe, (but this it has in common with all the other species of the offence), that the crime is not complete by the fabrication of the writing, unless it be also uttered or put to use. For if when executed it is kept lying with the artist, unemployed, and is only by some accident brought to light, (in the course, perhaps, of search for some other writing), the evidence is wanting; though such a discovery must needs be attended with suspicion, of the fraudulent and felonious purpose of the fabrication; wherein lies the essence of the crime. Or grant that evidence were even recovered of the pannel's dishonest purpose, as by his own letters bearing his intention to utter the false writing at such a time and place, still it is no more than a naked purpose, just as in the case of a libel, composed, but not published, or an incendiary letter written, but not despatched, and of which it is not too late to repent, as long as it has not given birth to any act or measure, which may be to the prejudice of society or of a neighbour. It is therefore

Crime not complete without uttering.

"the Acts concerning the Kirks." These persons were convicted; but no sentence appears against them, (2d, 4th, 21st February 1596). The offence had been treated as treason.

¹ "Find, That the crime for which the petitioner is imprisoned is not bailable."

CHAP. V.

the act of uttering, which first bestows a form and consummation on the crime, such as gives the magistrate a title to enquire into it: Till then, it is mere wickedness of heart, for which the offender answers not to any human tribunal.

It is true, that by common style of all indictment for this crime, the forging, and the uttering or vending of the deed, are severally charged, and a relevancy is sought on either. But this form of libel, which is only of modern introduction, is meant to meet the case of the pannel being found art and part of the uttering only, (which is of equal guilt as the forgery), and not of the fabrication; and the charge of forgery in such a libel is not to be understood of the naked fabrication, as in contradistinction to the uttering, but on the contrary, as in connection with that act, which is a necessary ingredient of the crime, and is implied in the simple term forgery, wherever it is used. In the case, accordingly, of David Reid, where this alternative sort of charge occurred, the objection taken to it was repelled, and the libel sent to an assize.

Aug. 12. 1780.

Forger presumed art and part of uttering.

AND here we may take occasion to remark, how contrary soever it may be to first appearances, that in truth it is not as fabricator purely, but as presumptively accessory to the uttering, which completes the crime, that the maker of the false writing is punished, when he is not *proved* to be the vender also. Having been executed by him, and being under his power, from the very nature of the situation the writing cannot in ordinary cases pass out of his hands, or be uttered, without his privity and concurrence: for which reason, even in the more favourable case of another person appearing to be the vender, it will still be presumed against the fabricator, and need not be shown by proof upon the

the prosecutor's part, (at least, with the aid of ever so little communication between the vender and fabricator it will be presumed), that they were leagued in the adventure, and had, each of them, his separate department, with the consent of the other. If the fabricator deny this, it will rather lie with him, who has a strong presumption against him that he did not fabricate for nothing, to specify and prove the manner wherein the writing passed from him without his will; as by being withdrawn from his repositories, the loss of it with his pocket-book, or the like.

FALSEHOOD.

It is no less material to observe, with respect to what shall be accounted an uttering of the writing, that the great danger of this crime has established a very rigorous construction against the pannel. Not only it is no obstacle to the prosecution, that the money or other thing procured by the forgery has been refunded to the private party, so that no one ultimately suffers, (which happened in the case of Robert Fleming, and of George Mackerracher); but it is not even material that the writing should ever pass, or the imposition, even for a moment, take effect. He hath published the false writing for genuine, and his crime of *forgery* is complete, as soon as he has produced or employed it towards the prejudice of another; whereby not only is his felonious intention manifest, but instead of being under his power as before, the false deed is communicated to a stranger, and the last step is taken that depends on him to accomplish the intended deception. The libel is therefore good, if the false bond has been made the ground of action or diligence, though no money has been recovered; or if it has been produced and pleaded, or claimed upon in judgment, though not *abidden by* upon challenge, (for this seems to be only

What is a sufficient uttering.

Feb. 12. & 19.
1711.
Feb. 18. 19. 21.
1788.

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a contrivance for shortening the civil process of improbation of the writing); as in the case of William and Thomas Mackie, January 16. and February 2. 1636, who were pillored, declared infamous, and banished, for pleading on a false discharge of a bond: or if the judicial bond of cautionry has been tendered to the proper officer; as was found relevant in the case of Andrew Adam, relative to a bond of caution in suspension¹: or if the bill or bank-note has been presented for payment, though it be stopped, and the holder taken, in the very first essay². This doctrine stands even established by the authority of statute. In the case of Dempster of Muireisk, indicted for forging a bond of reversion, the Court had repelled the defence, that it had never been abidden by in judgment, nor used to the actual prejudice of the party. To confirm which precedent, the Legislature, in the statute 1621, c. 22. declared, that it shall not protect from the pains of falsehood to pass from the writing upon challenge, or engage not to make use of it in future. Notwithstanding this act, which is conceived in explicit terms, doubts had however continued to be entertained concerning the bare production of a writing in judgment, or the entry of it on record, how far either of these was to be reputed an use of the writing, and a completion of the crime.

For

Feb. 20. 1710.

What is a sufficient uttering.

April 20. 1620.

¹ The Lords "found the pannell's actual forging, or his causing and intyfeing others to forge, the subscriptions to the bond of cautionrie lybelled, or his actually giving in of the same with his own hand to the Bill chamber, to obtain a suspension, relevant to infer the pain of death; and found the pannell's use-making of the suspension, obtained on the said bond of cautionrie lybelled, *separatim*, relevant to infer an arbitrary punishment, and repelled the defences proponed for the pannell."

² In the case of Mrs Nisbet, though the bill forged was for L. 58, only L. 6 had been obtained on it as a pledge, and it had not been any farther used.

For the same act of federunt which convicts Alexander Forrest of falsehood, and remits him to Parliament for punishment, also makes this request, "That ane new act thair-
 " anent may be made for cleiring what fall be the punish-
 " ment for such faults heirefter; and whether or not the
 " inserting of false wreattis in registeres, or producing the
 " samyne in judgement, albeit they do not byde be them,
 " being challengeit theirfore, fall be fund to be a useing of
 " the saids false wreattes and punischable." This request
 does not seem to have been complied with. But it has ever
 been held in all modern practice, that a writing is to this
 effect sufficiently used by the bare production in judgment;
 which in substance is always the founding of a right or plea
 upon it as a genuine voucher. ¹ And with respect also to the
 registration; if either it be a registration for diligence, or
 such which is ordered by law, as in the case of seifins,
 hornings, and some others, the same rule shall probably be
 held: for in all these instances the entry on record is the
 public assertion of a claim upon the writing as good. If it
 is recorded for preservation only, there is more room for
 argument upon the other side; and this question has not
 yet been tried.

FALSEHOOD.
 Feb. 27. 1650.

6. ONE thing more is implied in our description of this
 sort of falsehood. That the making and uttering of the deed
 be felonious, or with intent to injure. Thus it is not a
 forgery, if to accommodate another who cannot write, and
 at his desire, a person shall sign a draught or receipt in the
 name of that other; as often happens among persons of low
 degree. For there is no imposition here, either done or in-
 tended, in the transaction. Mackenzie takes notice of such
 a case, which had fallen under his own observation ¹. On

Forging, &c.
 must be felonious.

E e 2

the

¹ Tit. Falsehood, No. 6.

CHAP. V.

the other part, the law will understand it to be fraudulent, and to the prejudice of another, if there be a purpose to gain any sort of advantage by the falsehood, though this should not be of so high a degree, as amounts to the cheating out of the sum or thing to which the writing relates. Thus it is forgery, (though possibly the excuse might be considered in the sentence), to frame a false bill, bond, or other voucher for ever so just a debt, or a discharge for money which was truly paid, but the payment forgotten to be vouched; for still the offender has made a false deed, and is thus far benefited, and the other party prejudiced, that he has written evidence of the state of the transaction, and therein enjoys that security which he coveted, and thought worth attaining at such a hazard.

Of Art and Part
of Forgery.

I SHALL now, before proceeding, subjoin a few things concerning the different ways in which one may be involved in the guilt of forgery. *First*; one is art and part by immediate assistance lent to the fabrication itself; so that if one person furnish the scroll of the false deed, another dictate the deed from that scroll, a third write it, and a fourth affix the false subscription in presence of the rest, all four are alike guilty of the crime. This was nearly the situation of parties, in the case of Halliday and others, where Marjoribanks the notary dictated a scroll of the false discharge to Halliday, (after consultation between them upon the matter), by whom it was sent to Lowrie, who filled it up in the blank-signed paper, with the assistance of Alexander Lowrie and John Winzet, the last of whom signed a false name of witness to the deed. All these persons had sentence of death; and as to Halliday this was the only charge in the libel. The same sort of accession happened in

Feb. 8. 1597.

in the case of James Tarbet and Finlay Ferne, February 15. 1600; for Tarbet, according to a scroll delivered to him by Ferne, wrote part, and employed John Kennedy to write the remainder of a charter, to which he saw Ferne affix his father's name. In regard to those who act as witnesses on such occasions; though they sign their own names, and after their ordinary fashion, they are not the less art and part of forgery, since they thus knowingly confirm the false subscription of party.

FALSEHOOD.

Secondly; It has already been intimated, that the user or vender of a false writ, being a different person from the fabricator, is nevertheless equally punishable as he, and that it is even as presumptively art and part of the vending, that the fabricator himself is punished, when he is not proved to be the vender too. This point is equally clear upon the course of practice, the opinion of lawyers, and the authority of our statutes, some of which are upon this head express. The plain reason is, that even when the vender has not from the first been privy to the process of fabrication, (which, however, he often is), he by wittingly using the false deed, becomes participant of, and associates himself to the whole guilt of that contrivance, which he adopts in its more mature state, and by his industry brings to the desired accomplishment and issue; in like manner as the publisher of a libel is participant of the guilt of the composition, which by his art he disseminates to the world. It is also to be considered, that the user of a false writing, more especially if it be drawn directly in his own favour, must in reason be presumed to be himself the falsifier too, unless he can by evidence throw off that charge upon another¹.

Art and Part
by using false
Writ.

1540, c. 80.
1551, c. 22.

Among

¹ See Lex 33. Dig. L. 4. Cod. ad L. Corn. de falsis.

CHAP. V.
Nov. 26. 1782.

Among other instances of capital sentence for uttering only, I may quote that upon John Macaffee¹; whose conviction, however intended by the jury, could only be construed as relative to certain articles of that sort of charge.

Art and Part by
procuring For-
gery.

THE same statutes which extend to the users of false writings, are equally levelled, and with as good reason, against the seducers and corrupters, at whose instigation the false instrument has been made. This rule of judgment was applied to the case already mentioned, of Robert Innes and Finlay Ferne, of whom the latter was the suborner of the other, to forge a seisin on the false charter, and therefore suffered death along with him. It will not, however, often happen, that the procurer of the forgery so thoroughly abstains from all direction or assistance towards the execution of the purpose, or from all use of the writing when made, as to be implicated in the crime upon that ground alone. In the case, for instance, of Nisbet, that person was the user, as well as procurer of the forgery, which was executed by one Household, whom she had ensnared into the employment².

Of remote Af-
sistance in For-
gery.

LAST of all; the question arises concerning assistance of a remote kind lent towards the fabrication, how far this makes the assister art and part of the capital offence: As in the case

¹ " Find the said John Macaffee guilty art and part of forging promissory-
" notes of the British Linen Company, as laid in the libel; and all in one voice
" find the 1st, 4th, 5th, 8th articles of the libel all proven. But find the other
" articles of the libel not proven." The 1st, 4th, 5th, 8th articles were charges
of uttering. See the printed Report of this case in the Appendix to Stuart and
Craigie's Collection of Decisions. The debate is blank in the Record.

² See the Report of this Case in Arnot.

FALSEHOOD.

case of the artist who makes the plate, or the paper, for throwing off the false bank note. The decision in such cases will depend on circumstances. If, (which has sometimes been the case), it can be shown that the tradesman not only knew the unlawful destination of his commodity, but was in a society with the forger and vender, by which they were severally to perform their parts in the adventure, and to receive their share of the profits thence accruing; this seems to be nothing less than an accession to the forgery: for there is here one joint and undivided undertaking, in which each is participant of what is done by the other, and must answer for it, as if done by himself. Instead of this, if there be no more in the case but an employment of the tradesman to execute such a piece of work in his trade, he is not thereby involved in any cognisable degree of guilt; not even though he should have reason to suspect the evil purpose to which his handy-work is to be applied. This, at least, was the judgment of the Court upon such a case, or rather a more unfavourable one, that of John Brown, against whom this verdict was returned: "Find it proven, that the brass plate mentioned in the libel, was engraven by the said John Brown, and that he was privy to the concealing of the same in a whin-bush in the moor of Falkirk; but find that it is not proven that he adhibited the subscription to, or issued any of the three notes libelled on and produced." The judgment was to assilzie the pannel *simpliciter*. But between these there lies a middle, though more unlikely situation, that of a tradesman who has a special privy to the evil object of his employment, and receives on that account a reward or extraordinary hire, but has no farther concern in the adventure or its profits. It may be thought, that up-

Mar. 12. & 14-
1781.

on

CHAP. V.

on such a delinquent, when the case shall happen, some punishment may suitably be inflicted.

False Notaries,
how punishable.

II. I SHALL now say nothing more of that sort of falsehood, which consists in the publishing of a deed as the signed deed of another. It is a different species of the crime, if a notary shall draw false instruments of seisin, intimation or the like, which never was given, or an officer of the law return executions of things which never were done, or were done otherwise than is set forth in these reports. For he is not giving forth his own act as that of another man, or putting himself into the person of another; he is merely in his own person, and in his official character, telling a most flagrant, impudent, and dangerous lie. Nevertheless, although in the matter of officers executions this distinction seems to have been acknowledged, and a milder course to have been taken; as appears from the case of Strachan the messenger, who for four false executions of charge and denunciation, was only scourged and deprived of his office; yet with respect to notaries, whose trust of office is higher, and their functions of still more consequence, and such as deeply affect the lieges in their most valuable estates, the contrary seems to have been holden. The act 1540, c. 80. was more especially directed against the falsehood of notaries; and in like manner as the other statutes were held to authorise the inflicting of death in other cases, this seems to have been held a warrant for the same severity upon this class of men, whose fidelity is so important to be guarded. Thus, on the same day that Ferne and Tarbet were condemned to die for forging a charter, Robert Innes notary had the like sentence for a false and antedated seisin, wittingly made by him upon it. Whether the seisin in that case bore the names of witnesses

Mar. 15. & 28.
1605.

Feb. 15. & 16.
1600.

nesses, or, if it did, whether these also were forged, does not appear from the record. But though the case be, that the notary does not sign the names of pretended witnesses, but induces persons to sign along with him in that capacity, the wickedness and the guilt seem to be much the same. In either case, the whole seisin is still a fiction of the notary's own contrivance, and he is art and part of the false subscriptions of his associates.

FALSEHOOD.

THE case of Innes is not the only instance of this construction of the law. On the 20th December 1616, Alexander Cook notary, Sheriff-clerk of Berwickshire, upon a libel which is laid on the act 1540, for falsehood in his office of notary, had sentence of death; having vitiated the entry of a seisin in his protocol-book, and having given forth two extracts of it, of different dates, and judicially sworn at different times to the truth of both. Farther; it had been thought to be of little moment, whether the notarial instrument were false by corruption and abuse of trust in a real notary, or through the false assumption of that character by one who was no notary, and who of course could give no true instrument of that kind. For this sort of falsehood, William Norval was condemned to die on the 9th June 1602, and John Moscrop, writer in Edinburgh, on the 8th February 1597. Also, among other charges, Thomas Marjoribanks was convicted as a false and pretended notary, on the same libel with Moscrop, and had sentence of death. No instance of either of these kinds of falsehood has been brought to trial in later times.

I SHALL now dismiss these, the capital falsifications of writing, with this general observation, that though the Court may, they are not however constrained, invariably to inflict

Discretion of the Court in punishing Forgery.

F f

the

CHAP. V.

the pain of death for such offences, but have a discretionary power, as in the case of theft, to accommodate the pain to the whole circumstances of the offender, and of the transgression. Thus, in the criminal Court, in September 1630, Richard Home, for forging a testimonial and passport under the hand of the Chancellor of Ireland, and of the Earl of Cork, had sentence to be scourged, burned in the hand, and banished. In like manner, William and Thomas Mackie, convicted of forging a discharge for L. 100 Scots, were sentenced to pillory, infamy, confiscation of moveables, and banishment. William Forsyth notary, for forging a charter, was declared infamous, pilloried, and banished. As was Lawson for using a false discharge, at the same time that Blair, the maker of the discharge, was hanged. More lately, John Grant was transported for forging the indorsement of a bill of L. 20. In like manner, the civil Court, instead of remitting to the Justiciary, have, in many instances, inflicted an arbitrary pain themselves ¹.

Jan. 16. and
Feb. 2. 1636.

July 4. 1638.

Feb. 26. & 28.
1650.

June 3. 1793.

Falsification of
Writs, how pun-
ishable.

III. I CANNOT discover, that, beside the two species already spoken of, any other falsification of writing has, at any period of our practice, been thought necessary to be chastised with the same severity. Some there are, which, in respect of prejudice to the party who is meant to be injured, and almost in respect of the wickedness of the contriver, may seem to be little short of those to which the name of forgery, in its stricter sense, is applied. If the holder of a bill alter the sum to his own advantage, or if the writer of a deed

¹ See in the Books of Sederunt the case of James Adie, and Marion Shaw, July 28. 1739. William Frazer, February 28. 1741; David Young, July 18. 1741; William Stevenson, Feb. 18. 1747; John Tennant, November 14. 1751; John Smith, March 2. 1753; Murdoch Campbell, August 7. 1756.

deed insert provisions, without the knowledge of his employer, in favour of himself or of others; certainly an act, which is not the act of the party, is here published as authenticated by his hand, equally as in the case of his subscription being counterfeited. But as devices of this kind are neither so frequent nor so dangerous as forgeries, by reason of the greater difficulty which attends the execution of them, and as in point of boldness at least, if not of depravity, there is some difference between the corruption of a genuine signed writing, and the supposition and signing of an entire deed in the name of another, so the lenity of our practice seems to have laid hold of this distinction, how slender soever, to save the offender's life ¹.

FALSEHOOD.

BUT the indulgence goes no farther. As great frauds and falsehoods, such contrivances are punishable with us at common law with pillory, infamy, and imprisonment, and in a flagrant case, even with transportation, added to these pains. And this holds good as to all the different modes of false writing; whether it be by false assertion in the instrument, as if it be antedated, or if a person falsely sign as witness to an execution; or by corruption of the written words thereof in the way of rasure, superinduction, interpolation, or the like. Thus Belsches and others were imprisoned and suspended, for antedating the registration of a bond; James Wright was pilloried for signing witness to executions without seeing the things done; Daniel Aitken, messenger, for altering material words in a letter, was deprived, imprisoned, and made incapable of trust; Robert

Sentences for
falsified Writ.

Nov. 18. 1737.

July 19. 1788.

June 2. 1750.

F f 2

Paton,

¹ The statute 7th Geo. II. c. 22. which makes such offences capital in England, does not seem to extend to this country.

CHAP. V.

Dec. 9. 1762.

Feb. 26. 1762.

July 5. 1763.

Aug. 6. 1766.

Paton, for calumniously denying his subscription, and trying to reduce it as a forgery, was imprisoned and stood in the pillory; William Dunbar, for raising and otherwise vitiating an interlocutor, had sentence of transportation for life; James Leatch, for vitiating a bill, had sentence of infamy, and to stand twice in the pillory. These judgments were given in the civil Court.

IN the Court of Justiciary also, Thomas Taylor, charged with attempting to alter two L. 5 bank-notes, into notes for L. 10, was transported for five years on his own petition, Aug. 11. 1753¹.

Sentence for falsified Writ.

BUT by far the strongest illustration, and which may serve instead of all others to prove the disposition of our practice, and the vigour of our common law in this department, is the case of Thomas Mathie, tried in the criminal Court, 10th March 1727. This man had been factor to the York-buildings Company on their estate of Winton; and the charge against him was, that after recal of his factory, he had up-lifted or had taken bills for certain rents and sums of money addebted to the Company, and had given discharges of them, which, as well as the bills, he antedated, to conceal the fraud, and that in one instance, he had cancelled a bill payable to the Company, and taken a new one of a false date, and in his own name, for the sum. These things were charged as being, in some measure, of the same nature with the counterfeiting of a new power of factory; in as much as through these false devices, his unwarrantable acts of administration were in appearance brought within the term of his expired power; and this for the fraudulent purpose of bringing the

¹ There were favourable circumstances in this case. Particularly, the prisoner seems himself to have revealed his offence to the Directors of the Bank.

the effects of the Company into his own hands. The libel was found relevant¹; and the pannel being convicted of one article of the charge, relative to the colliers' and salters' bills, was fined and found liable in expences. It cannot therefore be doubted, with respect to any false certificate granted by a person in his office, such as certificate of marriage, baptism, proclamation of banns or the like, that this sort of flagrant lie and breach of trust falls under the same rule, and is an article of criminal charge; though no trial of that kind has hitherto taken place.

FALSEHOOD.

IV. SUFFICIENT has now been said concerning the falsification of writings. Let us next attend to the form of process; which, from the remotest period of our practice, has been subject to this peculiarity, that it may equally be brought in the Court of Session, or of Justiciary; and moreover, (in which respect its situation is still more extraordinary), that though commencing in the civil Court, it often times terminates and comes to issue in the other.

Form of process for Forgery.

THE causes are obvious, which have led to the receiving of the Lords of Session, as Judges competent in the matter of

Court of Session can try Forgery.

¹ March 20. 1727. The Lords " find, that the said Thomas Mathie, pannel, " after intimation was made to him that his factory upon the estate of Winton, " from the Company of Undertakers for raising the Thames water in York build- " ings, was revoked, and a new factory from said Company was granted in fa- " vours of Mr Henry Streatchy, pursuer, and Mr Archibald Robertson; that the " pannel did thereafter grant receipts and discharges to, or did take accepted " bills from the persons debtors to the said Company in the produce of the said " estate, on account either of rents, coal, salt, or pan-wood, and did antedate the " saids receipts, discharges or bills, by making them to bear date prior to the re- " calling of his factory, though they were really granted posterior thereto; the " pannel's so doing, in all or any of the particular instances specified in the libel, " relevant to infer an arbitrary punishment; and repelled the hail defences pro- " posed for the pannel."

CHAP. V.

of forgery. The crime often comes to light in the course of process depending in that Court; whence arises a contingent jurisdiction over the offender, who is chastised summarily and without delay, in the very tribunal where he has transgressed, for his scandalous attempt to impose upon their wisdom, and to pervert the course of justice. Another, and an equally substantial reason, lies in the very difficult and tedious nature, generally speaking, of the proof of forgery, which is often impossible to be absolved, as must be the case with every trial by affize and in the criminal Court, in the course of a single sitting.

Are they exclusive Judges in first instance.

IN addition to these reasons, which of themselves are sufficient to justify this departure from ordinary rules, Mackenzie¹ hath farther supposed, that certain statutes have expressly bestowed this jurisdiction on the Lords of Session. Nay, he has expressly said that they are Judges in the first instance, exclusive of the criminal Court; in confirmation of which opinion he appeals to the judgment in the case of Lord Blantyre, and affirms that the books of adjournal do not contain an instance of process for forgery commencing in that Court. But in all this there is somewhat of inaccuracy. Though the act of Mary for the punishment of false witnesses has supposed, (for it does not introduce) the jurisdiction of the civil Court in the matter of perjury; no one of the statutes concerning false notaries, or false writings, has any expressions to the like purpose. And in the case of Blantyre, neither did the Justices give any such judgment as Mackenzie has supposed, nor had they any opportunity of doing so; seeing the forgery was not insisted on as a separate crime, but only as an aggravation of the charge of theft.

1555, c. 47.

July 7. 1664.

¹ Tit. Falsehood, No. 4.

theft. This *dictum* of Mackenzie has not therefore governed the practice of later times; which, on the contrary, affords sundry instances of process for forgery commencing, as well as ending, in the criminal Court. Two cases may in particular be attended to; that of Nicolson and Elliot in January 1694, and of John Howison in November 1705, in the first of which, the plea of incompetency was argued, and Mackenzie's treatise referred to in support of the objection. Judgment was also given against this plea, first in Sir Robert Dunbar's case ¹, and afterwards in the case of William Baillie and others, where, "as to the crime of forgery, " or using of false or forged passes, libelled against the said " William Baillie, the said Lords find the Court competent " to judge thereupon. But in regard it appears from the " debate that the only means of improving the said passes " are indirect, therefore, remit the same to be tried by and " cognosced summarily before the Lords of Session."

FALSEHOOD.

Nov. 22. 1714.

Sept. 6. 1715.

In later times, this general position has therefore been abandoned for the more limited plea, suggested by the last mentioned judgment, that the Lords of Session are at least exclusive Judges in all cases, such as that of Baillie, where the proof is in the *indirect* and more tedious way of circumstantial evidence. In the case of *James Baillie*, where this position was maintained, the interlocutor seems rather to wave the question; finding only, "in respect of the peculiar " circumstances of the case, that it is *inexpedient* to go on " in this trial before this Court *in prima instantia*," and therefore dismissing the process. Thus the question seems

If exclusive
where proof
is indirect.

Feb. 11. 1765.

to

¹ "The said Lords find this Court competent to cognosce upon the crime of " falsehood or forgery; but in respect neither the principal feisin nor the records " are produced, therefore find that article as libelled not relevant."

CHAP. V.

to be still open to a judgment; which if it shall distinguish the competent jurisdiction according to the nature of the evidence, and not according to the matter of the process, will establish the one instance of this kind that occurs in the whole circuit of our law.

Form of the
Action.

THE introduction of the process to the Court of Session, may be in two different ways. It may be by summons of reduction and improbation, raised by the private party, with concurrence of the Lord Advocate; and upon which, if the writings are produced, they may be *improven*, and the defender, if in custody and appearing, may be found guilty of the forgery, and punished, or remitted to the criminal Court. I say, if the party appear, and the writings are produced; for the accused cannot be tried in absence to the effect of remitting, or of inflicting any pain; neither can the writings be improved, but only suffer certification, unless they are produced; as was found in the case of Captain Barclay, January 26. 1670¹. The other way, and which has more commonly been followed in later times, is *per modum simplicis querelæ*; in the form of summary complaint, at instance either of the Lord Advocate, or of the private party with his concurrence, and which, in substance, is the same as an indictment, and must, along with its list of witnesses, and list of affize, be served upon the pannel in the like form, and upon the same *inducia*, as an indictment is. This way of proceeding, which in Mackenzie's time was reckoned extraordinary, and was only allowed in case of forgery of some part of process, or forgery committed by a member of the College of Justice, hath, during the greater part of the present century, been employed without any regard to

¹ See Stair's Decisions.

to these circumstances, and in particular has been the constant mode in the many trials for the forgery of bank-notes¹. There is, however, nothing to hinder it from being employed jointly with a summons of imbrobation; and this course was followed both in the case of Mrs Nisbet in 1727, and of Adie and Shaw, July 28. 1739².

FALSEHOOD.

UPON the charge, when duly brought into Court, the course of proceeding is by hearing parties on the relevancy of the libel and defences, and by judgment given on these; after which proof is taken on both sides, in presence of the Court. The proof may either be direct, by testimony of the persons whose names are forged, or indirect, by comparison of hands, *alibi*, and other circumstantial evidence: which two sorts of proof, according to the later practice, may be employed at the same time, or even the indirect upon failure of the other; since it is always possible that the instrumentary witnesses may mistake or be corrupted³. After proof taken, and full hearing of parties on it, and a final close of all the pannel's relevant allegations, who in this respect enjoys a benefit of bringing forward new pleas, and obtaining farther proofs, which no pannel in the Justiciary can pretend to, the Court proceed

Proceedings in Court of Session.

G g

ceed

¹ The trial of Gilchrist and Brodie commenced in that way in 1719. It is mentioned in Lord Royston's notes, that in the case of the Royal Bank against Wallace in July 1742, for forging bank-notes, which was brought into Court by complaint, some of the Lords thought that the cognisance of that form only belonged to the Justiciary; but in the end the jurisdiction was sustained.

² See Acts of Sederunt.

³ See Dictionary of Decisions, vol. i. p. 458.

CHAP. V.

ceed to give their sentence, as well on his guilt or innocence of the charge, as on the verity or falsehood of the writings. But with respect to the tenor of the sentence in the article of inflicting punishment, two situations are to be distinguished. The one is, where in the opinion of the Court it is fit to punish with an arbitrary pain; which they then award themselves, and which may be carried to any extent that is short of death: and the other is, where the public interest requires the forfeit of the offender's life; for which end, having no power to pronounce such a doom themselves, they must remit the pannel to the Court of Justiciary; there to undergo a new trial and condemnation.

Proceedings in
the Court of Jus-
ticiary.

IN pursuance of this remit, an indictment is framed, charging the pannel with the fact, as in common style, and which is served upon him with a list of assize, and of witnesses, and of articles to be produced in evidence, on the ordinary *induciæ*, and in the accustomed form. The list of witnesses is however very brief; only consisting of persons, who, if there shall be occasion for it by his denial, (as in the case of Raybould), may prove that he is the same person who was convicted in the Court of Session¹; and the productions are only

Maclaurin,
p. 472.

¹ The following words are part of the Solicitor-General, Mr Charles Erskine's notes in the case of John Campbell, in March and April 1731. "In this trial, after the reading of the diet, the procurators for the pannel attempted two objections, 1st, It was said that the extract was not proven. It was signed by one John Dalrymple, of whom they pretended to know nothing; but this was ridiculed by the Judges. 2^{do}, It was urged, that there was no proof that the pannel was the person found guilty by the Lords of Session. But it being notour to the whole Court, that he had been constantly kept in prison during the course of the trials, both before the Session and Justiciary, the Lords also disregarded this objection." These words are copied from the notes upon the printed papers in Mr Erskine's hand-writing. But no such objections appear in the record.

only the extracted decree of the Court of Session, and the forged writings themselves, authenticated by the subscription of the President of that Court. For in this, by immemorial custom, the condition of such a trial for forgery is quite singular, that it comes before the criminal Court in the shape of a concluded cause as to the matter of proof; in which the prosecutor is not at liberty to examine witnesses, or to bring any, whatsoever, farther evidence, but must entirely rest his prosecution on that which is contained in the extracted decree of the Lords of Session, to which the libel refers, as the sole proof intended to be used.

FALSEHOOD.

WHAT is true on the prosecutor's part, is equally true on the part of the pannel also; who, in his trial before the Lords of Session, has already had such advantages in point of prorogation of diet, allowance of new defences, additional proofs, and the like, as no pannel in trial before the Court of Justiciary can, in any the most favourable case, be indulged with. It is the maxim in the civil Court, "*nunquam concluditur in falso*:" that is to say, that as long as the case is in Court, and is not closed by extract of the decree, the Judges will not refuse to listen to any relevant defence, though late of being resorted to, nor exclude new light, if from any quarter it seem likely to be let in upon the case. To them, therefore, and not to the criminal Court, the pannel's request of additional evidence should have been made. And indeed, if a farther proof in exculpation were allowed him, then, in justice, must the prosecutor also be allowed a farther proof in reply, and this too by witnesses not contained in the original list which was served upon the pannel; and thus the inquiry would be drawn out to the length of many diets, and in a manner quite irreducible to

Is new Proof competent there.

CHAP. V.

Jan. 18. 1768.

Aug. 12. 1780.

Decree of Session; is it *probatio probata*?

the shape of a jury-trial, as well as to the entire disappointment of all those reasons for which the charge is allowed to commence in the civil Court, and to the occasioning of those very difficulties, both to Court and jury, which were meant to be avoided by this course of process. Hence in Raybould's case, though the Lord Advocate consented to the production of certain papers, which had been exhibited in the civil Court, but were not remitted, and of which the pannel meant to avail himself towards some new defence; this was *ex mera gratia* of the prosecutor, and was done under protest entered in the record, that he should not be held to have acquiesced in the lawfulness of the demand. In the later case of David Reid, the *Lords on such an application found, " That it is not competent for the pannel to adduce
 " any proof, other or farther, in his exculpation or alleviation, than what is contained in the decree of that Court,
 " referred to in the indictment, and therefore they refuse to
 " allow the witnesses to be examined."

Now here arises a question, both curious and important. As the decree of the Lords of Session is thus the sole evidence which the prosecutor is allowed to produce; is it also to be accounted conclusive and irrefragable evidence, (*probatio probata*), according to which the jury are necessitated to condemn; or are they at liberty to look into the depositions engrossed in the decree, and to acquit the pannel, if in their mind the proof is not sufficient to convict him? The first has been maintained; and in former times it seems even to have been the prevailing opinion on the subject. Mackenzie has expressly said, that the decree is read for sole probation, " and that the assize must condemn thereupon, else
 " they

FALSEHOOD.

“ they will be pursued for error ;” in confirmation of which he elsewhere adds ¹, (but on this it is to be observed, that no such thing appears on the record), that in the case of Binning, in 1662, the Lords refused to receive a verdict of acquittal, and obliged the assize to reinclose and condemn. Even in later times this opinion was not abandoned. It is laid down as law by Erskine ²; and in the case of Margaret Nisbet, it was even endeavoured to be established in a more direct and palpable form, than had ever before been tried. The libel in that case concluded to have a relevancy found, not only upon the pannel’s guilt of the charge as made in the libel, but also upon the mode of proof of her guilt, as by the decree of the Court of Session *per se*. The conclusion is in these words: “ All which or any part thereof being found
 “ proven against her the said Margaret Nisbet, and particu-
 “ larly it being *found proven*, that the said writings above
 “ mentioned, or any of them, *were found* to be fabricated,
 “ false, or forged, *by the said sentence* of the Court of Ses-
 “ sion, and that she was by *the same sentence found guilty*,
 “ or art and part of the said forgeries, or any of them;
 “ by the verdict of an assize before our Lords Justice-
 “ General, Justice-Clerk, and Commissioners of Justiciary,
 “ she ought to be punished with the pains of death.”
 This was to ask in plain terms, that the Court by their interlocutor, should bind down the jury to convict upon the single ground, that such a decree had been given by the Lords of Session. And to that effect the Lord Advocate did urge his plea in the debate; appealing in support of it to the constant style of verdict in such cases, which
 had

Jan. 23. 1727.

¹ Tit. Falsehood, No. 7. Tit. Jurisdiction of Lords of Session, No. 3.

² Tit. Crimes, No. 72.

CHAP. V.

had always been to convict the pannel "in respect of the decree of the Court of Session;" so that (said he), though the same words and form of phrase may not have been used in former libels, yet truly this was their substance and meaning. As far as can be judged from the interlocutor upon record ¹, the Court had been desirous of avoiding to decide on this debate; for it takes no notice of this conclusion either way, but finds a relevancy in common style, on the pannel's being guilty, or art and part of forging the bill or obligation libelled.

Mar. 26. 1731.

THE Lord Advocate had not, however, been discouraged. For the same form of libel was again used, and the same debate arose, in the case of John Campbell, where the prosecutor argued, that the jury are here in the same case, as a jury sitting on a felon who has returned from transportation, or on a capital convict who has escaped; which jury must find guilty in respect of the former verdict or sentence. Interlocutor was again given in the like general terms, as in the case of Nisbet; and the jury returned a verdict of *guilty*, without taking notice of the decree, or assigning any ground of their opinion ².

April 5. 1731.

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¹ Lords find, "That the pannel being guilty of forging the bill and obligation or declaration libelled, or that she was art and part thereof, relevant to infer the pains of death," &c.

² I learn from the notes already referred to, which were taken by the Solicitor-General at the time, Mr Charles Erskine, that the Court had spoken on this point, and had differed in opinion. "As to the second point pleaded, the President of the Court, and one of the Judges, declared their opinion, that the jury were to be determined upon the point of proof, by the decree of the Lords of Session. Two of them (N. M.) made a sort of distinction, and said, that practice had so far settled the matter, that there was no necessity of examining the witnesses before the jury, the depositions being engrossed in the decree, but that it was entire to the assize to examine the proof, how far they were satisfied with it."

I do not find that the same conclusion has been inserted in any libel of a later date; and Maclaurin, in his report of the case of Raybould, mentions, That the Court were agreed upon the right of the jury to acquit, if in their own conscience they saw cause for it, as well as that in this instance they did not rely on the authority of the decree, but looked into the depositions, and were determined thereby in their verdict. It does not seem probable, that a different instruction shall be given on any future occasion. For as none of the reasons of commencing process in the civil Court, seem to afford a just inference to the sustaining of their decree as conclusive of the issue, but rather as the report of a commission entrusted to them by law, as the body the most capable of taking such a proof, and of forming an opinion whether the pannel should be put upon trial for his life, and as that body which at any rate has right to *improve* the writings as to their civil effects; so any other opinion seems scarcely to be reconcileable to the dignity or the obligations of the office of an assize.

FALSEHOOD.

FROM this question arises another. If the decree of the civil Court is thus not conclusive against the pannel, is it conclusive in his favour when it acquits; or is it still competent to the prosecutor, to have him tried in a new and original process brought against him in the criminal Court? I do not find that this has ever been attempted, nor even that any such opinion has ever been maintained. Having laid his complaint, and taken his proof in that Court, and according to that form, which is competent by custom in the trial of this crime, the prosecutor has joined issue with the pannel, and, as in all other cases that have gone the length of taking proof, must abide by the decision of the judicature, which

Decree Absolvi-
tor of Session;
does it hinder
farther Trial.

CHAP. V.

which has right to pronounce upon the evidence as brought forward at the time. The opposite opinion would equally expose the pannel to the suspense and misery of a second trial, as if he were twice remitted to an assize; and if against common rules, and out of necessity, the Court are held as an assize, to the effect of taking a proof on which he may lawfully be convicted, they must likewise be held so to the effect of finishing the proof of his guilt, and hindering all farther prosecution of him, other than shall be laid upon and in pursuance of that proof.

Must capital pain
follow on Re-
mit.

ONE question more will require a word or two to be said upon it. Is the remit from the civil Court binding on the Lords of Justiciary, to cause them pronounce *sentence of death* upon the pannel; or are they at liberty to punish according to their own opinion of the case? Now, as to this; Mackenzie, speaking of the verdict found in pursuance of a remit, has said, "upon this verdict the Justices are tied" expressly to condemn the defender to be hanged¹. In the case too of Margaret Nisbet, according to the form of the libel, the sentence and remit were charged to be no less obligatory on the Court to find a relevancy for the pains of death, than on the jury to find the pannel guilty: nay, according to Lord Royston's notes upon that case², so generally had this opinion of Mackenzie's been taken to be good law, that it was rather regarded as a novelty, and gave rise to debate on the bench, when that Judge maintained the contrary at remitting her from the civil Court. In truth, there were several things which had contributed to spread the belief of such a doctrine. It had been taught,

¹ Tit. Falsehood, No. 7.

² Tit. Falsehood, No. 25.

and was received, that the Court of Justiciary, in the first instance, were not even competent to this sort of trial, and were only recurred to in capital cases, for the purpose of giving out a sentence, which no civil Court could give. Anciently too, the Court of Session had enjoyed a sort of supereminence, to the Court of Justiciary, in virtue of which it might be thought, that their opinion given upon any process which they remitted to the other, should be binding. Farther, lawyers were affected by the ordinary course of capital judgment following upon remit; this being only made in flagrant cases, and such where there was little doubt of the propriety of inflicting the highest pains. In truth, there were however several precedents to the contrary; the case of Strachan the messenger in 1605, of Forsyth in 1638, and of Lawson in 1650, (not to mention that of Craig, a false witness, March 15. 1605); in all which cases only an arbitrary punishment followed on the remit from the Lords of Session. But even if there had been no such precedents, Lord Royston's remark would still be just, that it is not easy to imagine, how in a capital matter, and one which is properly of their own cognisance, a sovereign Court shall be bound to the opinion of another judicature; and this difficulty will appear the stronger if it be considered, that not a majority only, but all the Judges of the Court of Justiciary, may have been in the minority, as Judges of the Court of Session, at remitting. The issue was in the case of Nisbet, that in the criminal Court the prosecutor did not much insist on this article of his libel; and that while the Judges thought upon the case itself, that the woman was deserving of death, they were however unanimously of opinion, that they had right to punish, as on other occasions, according to conscience¹, and their own impressions of the degree of guilt.

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¹ See Lord Royston's note, which is printed entire in the appendix.

FALSEHOOD.

CHAP. V.

Can inferior
Courts try for
Forgery.

I SHALL now terminate this of the process for forgery, by observing, that though the inferior courts must be allowed to judge incidentally in the improbation of executions relative to action before themselves, and of any writs which are produced in such action, and are there challenged by way of exception or reply; yet all process of reduction and improbation, all original and separate process for punishment of forgery, and all trial of any forgery in the indirect manner, seem to have been reserved, as matters of difficulty, for the peculiar cognisance of the Supreme Courts: as also it is understood, that no inferior Judge can in any case remit to the Court of Justiciary.

Of the Forgery
of Stamps.

V. THESE are some of the most material circumstances pertaining to the forgery of writings; which is the most important sort of falsehood, and chiefly rests upon the ground of common law. Among the other species of falsehood, those which are capital, and are not distinguished as separate crimes, by appropriated names, are to be found in the department of the revenue law, and are referable to the authority of statute. Provisions to that effect have in particular been found necessary for the security of that very large and important branch of the revenue, which is collected by means of stamps, and, by the counterfeiting of these devices, might be easily defrauded, to the great profit of the offender, as well as to the injury of the fair dealer, and of the public. By the various statutes, therefore, (not pretended to be here enumerated), which introduced or augmented the stamp-duties upon the several articles of leather, starch, perfumery, almanacks; cards and dice; licence for ale, wine, or exciseable liquors;

¹ See case of Williamson against Cushman, ult. Nov. 1630, (Durie), Jan. 26. 1677, Cowan.

liquors; policy of insurance, receipts, bills of exchange, and promissory-notes; as also upon paper, vellum, or other material on which deeds, contracts, or obligations are written; it has been made a capital crime to counterfeit any of the seals, stamps, impressions, or other devices, by means of which these duties are collected, or knowingly to use or sell such counterfeit stamps, or privately and fraudulently to affix and use the true stamps. By the 12th Geo. III. c. 48. it is even made a felony, and punishable with transportation for seven years, to insert any writing in respect of which a stamp-duty is payable, upon the same paper wherein any other writing chargeable with a stamp-duty has been, or by any sort of operation to transfer the stamp from one paper to another, or fraudulently to alter the contents of any writing engrossed upon stamped paper, to the prejudice of the revenue.

FALSEHOOD.

UPON one of these laws, the act of the 12th Anne, c. 9. Feb. 6. 20., 21. which imposes a duty on paper and vellum, &c. James Auchterlony was tried and had sentence of death. Also on the 1st August 1729, relevancy of the pains of law was found, both at common law, and upon a statute of the 9th of Anne, against Thomas Porteous, charged with forging the stamp upon dressed hides ¹.

24. 1716.

H h 2 THOUGH

¹ "The Lords find the pannel, about the time libelled, his having counterfeited or forged a stamp, or mark, provided, made or used in pursuance of the act libelled, entitled an act for laying on certain duties on hides and skins, or his being art and part thereof, relevant to infer the pains of law; and, *separatim*, Found the pannel his having uttered, vended, or sold any hide or skin, with such counterfeit or forged mark thereon, knowing the same to be counterfeit or forged, or his being art and part thereof, relevant to infer the pains of law; and repels the haill defences proponed for the pannel."

CHAP. V.

Common Law
as to forging of
Stamps.

THOUGH statutes were requisite to warrant the pains of death in such cases, it is not however to be imagined, (though the law of England in this respect may be different), that the offence of forging the revenue stamps is therefore entirely statutory, and cannot to any extent be punished at common law. As soon as any stamp-act passes, this article of revenue is the lawful property of his Majesty and his successors, and as much as any other property, enjoys the protection of the common law of Scotland, which will defend it from all manner of fraudulent devices, and especially from all that are executed by means of falsehood or forgery, to injure or disappoint it; for it cannot be thought that these are in the least more excusable, as being directed to the prejudice of the Sovereign and the public, and not to that of an individual.

Mar. 18. 1793.

THIS principle was exemplified in the case of Brown and Macnab, starchmakers. These persons were charged, both at common law and on the statute in that behalf, with counterfeiting the stamp used in the collection of the duty upon starch. So far as laid upon the statute, and for the pains of death, the libel was found not relevant, by reason of certain deviations from the statutory mode of affixing the stamp. Nevertheless, as the mode actually practised had the authority of the Board of Customs, and had been used for some years, and been acquiesced in by the trade, the Court were of opinion, and to that effect gave judgment, that the charge inferred the highest arbitrary punishment at common law¹.

VI.

¹ "Find that the statute libelled on extends to Scotland; find that the crime charged in the minor proposition of the libel does not fall under the said statute; but find the libel as laid on the common law, relevant to infer the pains of law."

On

VI. THE same wholesome and vigorous constitution of our common law appears in other points of dittay, which involve a charge of falsehood. In particular, process will be properly brought under this generic name, for any sort of *conspiracy or machination*, directed against the fame, safety, or state of another, and meant to be accomplished by the aid of subdolous and deceitful contrivances, to the disguise or suppression of the truth.

CONSPIRACY.
Of false Conspira-
racy.

SUCH a case, and in substance libelled accordingly¹, was that infamous and abominable covenant between Nicol Muschet and James Campbell; whereby Campbell, for a sum of L. 50 received from Muschet, agreed to procure for him two false affidavits or testimonies to the adultery of his wife; so as to enable him to obtain a divorce. For this purpose Campbell, by very foul means, of unlawful warrants and the like, having got the woman's person into his possession, and having by devices, (if possible still more wicked), stupified her and laid her asleep, and having put a man to bed to her in that condition, he introduced certain persons into the chamber, there to

Case of Camp-
bell & Muschet.

Mar. 21. 28. 30.
31. 1721.

On the 18th November 1793, John Macnab was again indicted, (for the first libel was not farther insisted in), by libel laid on the common law, and being convicted, he was banished forth of Scotland for 14 years.

¹ The libel, in the major proposition bore, *inter alia*, this charge: "The contriving or executing of wicked projects, *deceitful and false machinations*, for loading of innocent persons with heinous crimes in order to subject them to the severest punishments, the encouraging a husband to unjust and calumnious accusations against his own wife in matters of the greatest consequence, and assisting him to make them effectual, &c. are crimes."

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to see them in bed, and the man at the time either debauching her, or making it to appear so. The persons thus made witnesses of her shame, and meant to be afterwards made use of in that capacity, were not privy to the contrivance, and were themselves imposed on. The crime could not therefore be charged as subornation or attempt to suborn; since the things to which those persons were to swear, they believed to be true, and had actually seen. Nevertheless, as the charge of wilful adultery to be inferred from those facts, was itself an utter falsehood, to which those instruments were without their knowledge to be made subservient; no doubt was entertained of the competency of punishing it (and some of the Judges² even inclined to a capital pain), as a false conspiracy and machination, or crime of its own sort. Campbell was found "guilty art and part of the "machination as libelled and perpetrated in James Smith's "house in the Abbey of Holyroodhouse," and had sentence of infamy, and transportation for life.

Case of Elliot
and Nicolson.

ANOTHER instance, and in all respects a fit companion to that of Campbell, is the older case, more than once alluded to, of Elliot, Nicolson, and Maxwell, tried in January 1694.

DANIEL

¹ This appears from several passages in the libel and informations.

² This I say on authority of the following note on the printed papers in my possession.

March 21. 1721. The Lords "found any of the articles of the indictment *separatim*, relevant to infer an arbitrarie punishment. Though several of the "Judges were of opinion that the 1st, 3d and 4th articles conjoined were relevant to infer the pain of death, as importing a kind of subornation or receiving "money to suborn on the first article, the third the crimes of rape and falsehood, "or *suppositio falsæ personæ*: But the rest did on good grounds differ from them, "for the reasons mentioned in the pannell's information, and more fully reasoned "among the Judges, at advising the relevancie."

DANIEL NICOLSON, writer in Edinburgh, was engaged in an adulterous commerce with Marion Maxwell; and thence arose a bitter enmity of both these persons to Jean Sands, his lawful wife, and an earnest desire to get rid of her, in order that they might marry, or at least enjoy their unlawful intercourse more freely. Their first intention was to dispatch her by poison; and thus far they went in the prosecution of it, that they seduced a physician in the same city, Dr John Elliot, to furnish them with poisonous drugs, to be applied to her person. This purpose did not however succeed; though it appears that Elliot had put the drugs for that purpose into the hands of Maxwell. They therefore changed their plan for an equally wicked, but far more complicated, and more hazardous contrivance, *viz.* a conspiracy to fix on Mrs Nicolson, and on Margaret Sands, her sister, a design of poisoning Nicolson, her husband. In pursuance of this, equally wild as flagitious compact, they proceeded in the following manner. Nicolson waits on the Lord Advocate, Sir James Stewart, and acquaints him, as in great secrecy, that his life is in danger from the attempts of his wife and her sister, who have conceived a groundless suspicion of adultery between him and Marion Maxwell; and he adds, that he has certain knowledge of the thing from the information of Dr Elliot, to whom they had applied for poison, and who, being filled with horror at such a proposal, had come and revealed it to him and Maxwell. This story he lays before the Advocate in such artful manner, as completely to deceive him; and he asks advice of him how to proceed for his safety. The Lord Advocate sends for Elliot, who confirms the whole particulars, and adds that the two sisters seem immeasurably desirous to have the poison: On the question being asked, he even ventures to say,

CHAP. V.

say, that he believes they will not scruple to give a receipt for the poison, specifying the use to which it is to be applied. In consequence, he receives an instruction from the Lord Advocate, to furnish the poison, and take such a receipt from them if they will give it, and instantly to bring it to him when obtained. In giving this direction, the Lord Advocate's intention was to send and secure the poison in the hands of Mrs Nicolson, and to provide evidence at the same time, of the mortal purpose for which she had procured it. The conspirators intended secretly to convey the drugs into Mrs Nicolson's repositories; so that they might be found there upon search.

Cafe of Elliot
and Nicolson.

SOME farther intercourse relative to the terms of the receipt, took place with Elliot in the course of the succeeding days. And the result was, that, in a short time, Elliot returned to the Lord Advocate, with a receipt for the poison, under the hands of Jean and Margaret Sands, and in the terms desired. In truth, this receipt was forged. Warrant however immediately issues on it, to apprehend the two women. By this means the charge becomes public; and in consequence a fame arises, owing to the known evil character and scandalous conduct of Nicolson and Maxwell, that the whole story is a lie, and a foul conspiracy of those adulterous paramours, to destroy his lawful spouse. In short, one circumstance transpiring after another, Elliot is alarmed and confesses; and the issue is, that all three are brought to the bar, charged with the forgery and use of the receipt, the design to poison, and the falsehood and conspiracy to fix that crime upon Jean and Margaret Sands. Nicolson and Maxwell are farther charged with the crime of notour adultery. Elliot is found guilty of forging and using the false receipt, of the
conspiracy

conspiracy against Jean and Margaret Sands, and of furnishing the poison; Nicolson and Maxwell are convicted of nocturnal adultery, and of using the false receipt: And all three have sentence of death; which is put in execution. It is to be observed, that the conspiracy to fix the suspicion of an intent to poison upon Jean and Margaret Sands, *jointly* with the act of furnishing poison, with intent to destroy the former of these persons, was found relevant to infer the pain of death¹, independently of the forging or using of the receipt.

CONSPIRACY.

VII. THESE were instances of high and daring malice, which could hardly, in any civilised country, be supposed to be beyond the reach of the common law. But it is the genius of our practice equally to extend its attention to the inferior offences of the same general class. Thus, on the 5th February 1750, libel was sustained against George Craighead, as well at common law² as upon certain statutes, for falsely assuming the character of clergyman, to which he had no pretension, and celebrating marriage, and giving certificates thereof, under a false name. Indeed it is not to be

Of false Assumption of Character or Office.

li

doubted

¹ " Find the pannel's forging or using, or being art and part of forging or using the receipt of the poison libelled, relevant, *per se*, to infer the pains libelled; *as also*, find the pannel's giving poison to Marion Maxwell the other pannel at her desire, to be applied to the body of Jean Sands, spouse to Daniel Nicolson; *with* the endeavouring to fix a design upon the said Jean Sands and her sister, of poisoning the said Daniel Nicolson another of the pannels, relevant to infer the pains libelled;" which were the pains of death.

² " And farther, by the laws of this and other well governed realms, a person taking upon him to act as a minister or clergyman, and as such celebrating a marriage, or signing an attestation or certificate thereof, under a false or assumed name, especially when one of the parties so pretended to have been married, was formerly married to another spouse. Yet true it is, &c.

CHAP. V.

doubted with respect to the false assumption of any official character, for the purpose of breaking any point of public discipline or order, that this scandalous imposture falls under the reprehension of the Magistrate, without aid of any statute directed against it.

Of Fraud or
Swindling.

THE same is even true of those offences, of a pure private and patrimonial nature, which fall under the description of what is known in England by the name of Swindling, and is committed by some false assumption of name, character, commission, or errand, for the purpose of obtaining goods or money, or other valuable thing, to the offender's profit. With respect to tricks or frauds of this sort; the more profitable market of England, and its more artificial and punctilious system of law, have obliged our neighbours to guard against them as they arise (in which shape the remedy is always imperfect), by successive provisions of the Legislature. But as these do not extend to, so neither are they necessary in this country, where the common law takes cognisance of, and competently punishes all such practices, as frauds and falsehoods of a criminal nature.

July 31. and
Aug. 1. 1786.
Jan. 12. Feb. 6.
July 20. 21.

I SHALL mention two late examples: the case of James Grahame, and that of Thomas Hall; both of whom were adjudged to be transported. The former had obtained money from several unsuspecting persons, under pretence of having lately seen their relations abroad, and being the bearer of presents to them from those relations, which, as he alleged, were on board the vessel with him, and had put him to charges in the payment of freight and the like; in support of which fable he showed pretended bills of loading and other vouchers. The libel was laid on a statute as well as at common law, but was only sustained upon the latter.

THE

THE substance of the charge against Hall, was the obtaining of goods from various dealers under the false pretence of setting up shop in Edinburgh, and having a trade there to carry on. The man had indeed hired a shop, as if with the view of trading; and the better to procure a farther credit, he had even paid in part for the goods which he received. But in truth he was no trader, but a practised cheat, and never meant to carry on traffic as a shopkeeper, but to procure and run off with the goods; which in due time he did, leaving the shop furnished with a show of fictitious bales and empty boxes, to deceive for a time such as might enquire about him. The case was thus distinguished from the pure civil wrong of failure to pay for goods obtained on credit, in that the whole circumstances of the story, the coming to Edinburgh, the hiring and opening shop there, the assumed name of trader, and even any business done by him as such, were no more than the detail of one original, false, and fraudulent purpose, to obtain and run off with the goods, unpaid. The statute of the 30th Geo. II. c. 24. on which also the libel had been laid, was found not to extend to Scotland.

FRAUD AND
CHEATING.
Cases of Fraud
or Cheating.

A PRIOR case of the like complexion, and judged upon the same grounds, is that of Mathew Jack and Humphry Ewing. These persons were dealers in tobacco, and were in the use of exporting that commodity; on which occasion they had drawback of the duties paid at importing. To ascertain the amount of the drawback, the tobaccos were weighed in their presence, and that of the King's officers, and with the King's weights; which were fixed to the balance with a chain, secured with a padlock, of which the King's officers kept the key. But this security the pannels had

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contrived to get the better of. They regularly, in the night, before the weighing of their own tobacco, picked the lock of the padlock, and detached certain of the King's weights, and substituted an equal number of their own, considerably short of weight, but in appearance like the other. With these their tobaccoes were weighed; and thus they falsely and fraudulently gained the drawback on a greater weight than they exported, to the extent, it appeared, of 28 lb. in a hogshead. After serving their purpose, the false weights were again withdrawn in the night, and the King's weights were replaced. These persons had sentence to be scourged at the market-crosses of Glasgow and Greenock, and to be drummed out of those towns.

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or Cheating.

ONE case more shall be stated in illustration of this salutary rule;—The case of George Macfarlane, merchant in Glasgow, who was tried there before Lord Royston, on the 10th of May 1733, at instance of William Alexander, merchant in Edinburgh. The libel bore, that having sold certain hogsheads of tobacco to Michael and Thomas Wallace, as agents for Alexander, and having in their presence marked these hogsheads for him, he afterwards either transferred the marks to other hogsheads of tobacco of inferior quality, or took out the tobacco in the marked hogsheads, and replaced it with other tobacco of an inferior kind, and by this fraud and false device, cheated Alexander of his property. The Lords found it relevant to infer the pains of law, “ That the pannel by himself, or others by his warrant and approbation, time and place libelled, fraudulently defaced, erased or altered the marks put upon any of the hogsheads mentioned in the libel, as chosen by Michael and Thomas Wallace the pursuer's agents, and his
“ having

“ having by himself, or others by his appointment, put on
“ the like marks on other hogsheds of tobacco, or changed
“ the tobacco in the said hogsheds so marked.”

FRAUD AND
CHEATING.

ACCORDING to the principles of our practice, it would be no impeachment of these judgments, which are all of modern date, that they were even the first of the kind, and were pronounced upon offences of a new species, of which no resemblance is to be found in our older practice. But they have the authority of at least one judgment of an ancient date; though perhaps the charge would have been also relevant under the name of theft. In March 1634, James Clerk, “ brouster at the Waft-Port of Edinburgh,” was tried upon a libel, whereof the 4th article charges him with the *cozenage* of one James Moubray in Calder. It relates, that Moubray had sent his servant, James Doig, with his sword, worth L. 20, to one “ Robert Moubray, fword-flippir, dwelling outwith the Waft-Port of Edinburgh, to be dight and dresfit. Doig neither knew the fword-flipper, nor had ever been at his house. So, going along, with the sword in his hand, he meets the pannel, also a stranger to him, of whom he enquires the way to Moubray’s house, and at the same time tells him his errand. The pannel directs him to go by the West-Port. Meanwhile, he hastens home by a short way; disguises his person, by means of a cloak thrown about him, and certain other contrivances; and getting to the West-Port before Doig, he waits there for his coming. On his arrival, he again accosts him, and asks him whom he seeks. “ Robert Moubray fword-flipper,” answers he. Then quoth Clerk, “ *I am the man.*” And thus he gets the sword, which he turns to his own uses. He is charged as being withall “ ane coofenar, trickir, fraudulent and

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1634.

“ false

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“ false man, and abusir of honest persons, by fraudulent and
 “ dishonest meanis.”

Cases of Fraud
 or Cheating.

THE pannel's plea to this charge, is entered in these words: “ As to the fourt article anent the pannell's alledgit
 “ coofanadge, it is answerit by the pannell, his prolocutors,
 “ that the famen is nawayis relevant to pass to the know-
 “ ledge of ane assize, being foundit upon nather law nor
 “ practique; affirming that nae man can produce the like
 “ caice, quh' the samyn was tryit at ony time be an assize.
 “ And quh' it is lybellit, that the pannell is a common
 “ coofenar, *una birundo non facit ver*, and this is but *casus sin-*
 “ *gularis*: under protestatioun alwayis, that the pannell na-
 “ wayis grantis the famin.” The prosecutor answers in
 substance, that the crime contained in the 4th article, is a
 crime punishable of the law,—the *crimen falsi*, of which the
 pannel is guilty by assuming the name of Robert Moubray,
 and thereby deceiving Doig; but that he is content that the
 pannel's punishment, if he be found guilty, shall be in *arbi-*
trio judicis. “ The Justice finds the said fourt article rele-
 “ vant to pass to the knowledge of ane assize, as ane crime
 “ of the awin kynd, and in caise of convictione, the punish-
 “ ment to be arbitrarie, excluding lyf and lym.” The man
 was convicted, and remitted to the Privy Council for his
 sentence; but what this was does not appear in the record.

WE have, however, in this century, some instances of
 prosecution for a new species of fraud and falsehood, very
 remote from any thing which the less fertile invention of our
 ancestors had devised. One instance is the case of Maciver
 and Macallum, tried before the Judge-Admiral in July 1784,
 for a fraudulent combination to cheat the insurers of a cer-
 tain ship and cargo, by privately relanding part of the insured
 goods,

goods, and sinking the ship upon the voyage; for which purpose certain plug-holes bored in the bottom of the vessel had actually been unstopped, so that the vessel was beginning to fill, when it was captured by an enemy. In this way, the discovery was made, and the ship saved from sinking; but the pannels had proceeded to recover from the underwriters, the full sums insured upon the ship and cargo. For this complicated fraud and falsehood the Judge-Admiral condemned them to pillory and banishment upon the ground of common law; and this judgment, when brought under review by suspension, the Court of Justiciary confirmed; having expressly found¹ that certain statutes, on which as well as on the common law the libel had been laid, and which the Admiral had disregarded as inapplicable to the case, did not extend to Scotland at all.

July 21. 1784.

THE like offence of making high insurance on a vessel, and wilfully casting it away with intent to prejudice the insurers, was by the Judge-Admiral found relevant to infer an arbitrary punishment at common law, in the case of James Macnair, on the 14th March 1751; which seems to have been our first trial of this sort. But a conviction was not obtained. This article will be treated more at large, under the head of crimes injurious to trade.

It

¹ "Find, that the statutes of the 4th and 11th Geo. I. libelled on, do not extend to Scotland; but find that the libel, as laid upon the common law, was rightly found by the interlocutor of the Judge-Admiral relevant to infer an arbitrary punishment; and find that the verdict of the jury, as applied to that interlocutor, does warrant the judgment of the Judge-Admiral which passed upon it; and upon considering the atrocity and dangerous nature of the crime so charged and proved against the complainers, find that there is no just ground for mitigating that judgment; and repel the whole reasons of suspension, and refuse the bill."

CHAP. V.

Use of false
Weights and
Measures.

IT were vain to think of enumerating the many and various forms of cheating or fraud, in which falsehood is one of the chief ingredients of the guilt, and a cause of prosecution. The instances which have been given may serve as an illustration of the settled principle of our practice, and as a ground of inference to other cases of the like cozenage and circumvention. I shall therefore mention but one other sort of falsehood, the easiest perhaps and most familiar of any, and which accordingly has not been left to the pure care of the common law: I mean that which is committed by the use of false weights and measures, whereby the lieges, and especially the mean and indigent, are cheated in their daily and necessary traffic for the many commodities which are disposed of in that way. This is acknowledged as a point of dittay in the *Leges Burg.* c. 74. which place the offender's life and limb in the King's will for the fourth offence; in the acts 1493, c. 47. and 1607, c. 2. the last of which inflicts the pain of escheat of moveables, and the other orders the transgressors to be punished as falsars; and in the act 1661, c. 38. which commits the care of this matter (formerly appertaining to the Chamberlain's department), to the Justices of the Peace, and Magistrates of burghs, and more especially to the Dean of Guild.

THESE things seem to be necessary for involving the accused in the guilt of this offence. 1st, The deficiency of weight or measure must be manifest and material, such as is injurious to the customer, and cannot be supposed to pass unobserved on the part of the user. Hence, verdict being returned against Andrew Cochrane in a circuit Court at Ayr, finding " the
" said Andrew Cochrane, his weights proven light as to his
" stone and quarter weight, but the quantity not proven what
" they wanted, and his measures proven short, but not the
" quantity "

July 10. 1671.

" quantity what they want ;" and this verdict being referred to the whole Court, " they fand the verdict of assize " both unclear and disconform to the dittay," and therefore assilzied the pannel : for the deficiency might not be such as to infer the pannel's wrong. *2dly*, The false weights must have been used and given out for the true ones, (but this may be done tacitly, and will be presumed against the user), and the traffic have been carried on accordingly. *3dly*, They must be charged to be different from the legal standard : for if the charge is only of a deviation from the customary weight or measure of that neighbourhood or district, (a thing for which there is no rule nor authority), this of itself, and without farther accusation of some special device and dole, by which deception has been occasioned, does not seem to be a relevant charge. And so it was found in the case of Sir James Dunbar and John For-

FALSE WEIGHTS,
&c.

Aug. 11. 1714.

IN strictness it is even a point of dittay (1503, c. 96.) to make use of any weight or measure different from those which national authority has established. And if this appointment cannot every where be executed, by reason of the long practice and known custom of certain counties or districts to the contrary, it is not however to be imagined that the law is therefore obsolete, nor that in other quarters of the kingdom, or with respect to other commodities, which have not been subject to any such irregularity, a li-

K k

cence

¹ August 11. 1714. " Found the fourth article, viz. That Sir James used a " half peck measure, for receiving the fractions of his rent from his tenants, different from the measure commonly used in that country; and likewise the " fifth article, viz. That Forfyth used a half firloft for receiving his officer's corn " or Yule bannock, different from the measure commonly used in that country. " not relevant to infer a crime."

CHAP. V.

cence has been gained of dealing by various or arbitrary weights or measures, such as are of no known proportion, and are not reducible to any standard. For this loose practice is against all equality or fairness of dealing, and is at variance with our whole train of ordinances, as well as with the practice of all the countries of Europe, and their interest in traffic with each other.

I HAVE found but one conviction of this offence in the books of adjournal. On the 30th July 1629, William Brownlee, miller at Cairnbrue, was convicted of using a measure, or fourth part of a peck, to receive his multure, larger than that which he made use of in receiving the corn to be grinded in his mill. But the assize at the same time acquitted him of the making of this measure, which he had found in the mill at his entry; and he was therefore only condemned to pay a fine of 100 merks, and to find caution to abstain from the use of the measure in time to come.

It is substantially the same offence with this, if a dealer in any commodity, such as bread, which has a known weight assigned it by public authority, shall make and expose it of a lower weight. On this head there is the following entry in the abridgment of the record in the Advocates Library¹. "September 15. 1551. Thomas Craig
" *pistor de Edinb. in voluntate pro communi oppressione legiorum*
" *in confectiōe sui panis (lie laiffs) quatuor denariorum*
" *minoris ponderis ad tres vel quatuor uncias quam statutis et*
" *actis præpositi Ballivorum et Concilii de Edinb. continetur, in*
" *manifest. reipubl. damnum.*" The King's will was, that he

¹ The record itself, from the end of 1539, to 19th April 1554, has perished.

he should pay a fine of 500 merks; a great sum in those times ¹.

FALSE WEIGHTS,
&c.

¹ In September 1734, Alexander Innes, keeper of a rum-warehouse in Edinburgh, was fined by the Dean of Guild, for selling that commodity in bottles of various size, and short of the lawful standard. It appears that a reduction of the decree was attempted; and I have not been able to find the issue of the question.

K k 2

CHAP-

CHAPTER VI.

OF HOMICIDE.

CHAP. VI.
Of Homicide.

WE are now to enter on that class of crimes which are injurious to the person; and among these I shall begin with that one, the highest of any, and of which nature has most abhorrence, the crime of homicide, by which life is taken away, and the person of a human creature is destroyed. The order I shall observe in treating of this, equally extensive as important part of our subject, will be, by first enquiring concerning those things which are common to all homicide, and afterwards proceeding to distinguish the several degrees of homicide, one from another.

Attempt to murder not capital.

I. FIRST, it is necessary to all conviction of homicide, that a person have been actually killed. In this I mean to say, that no attempt to kill will come under the description, or expose to the proper pains of homicide, how deliberate soever the purpose, or how cruel the means employed, and how little soever it be owing to remorse or want of resolution on the part of the assassin, that he has failed of success. Nay, though the attempt have in a great measure succeeded, and the party have received a wound which brings him to the

the brink of the grave, and leaves him infirm for the remainder of his life, still the benignity of our practice will consider, that the man is not lost to society, and will allow the offender an opportunity to repent, and to make atonement for his crime. HOMICIDE.

OF this, our well known rule, no stronger instance needs be mentioned than the case of James Mitchell, who, in attempting to assassinate Sharpe, the Archbishop of St Andrew's, (for whom he had lain in wait to dispatch him with a pistol, as he was stepping into his coach at the head of Blackfriars-wynd, in the city of Edinburgh), inflicted a severe and painful wound on the Bishop of Orkney, under which he languished for years, and continued infirm and ailing till the time of his death. Now, in the trial of Mitchell for this offence, so far as the libel was laid at common law, and not on a certain statute, by which it is capital even to assault a privy counsellor on account of service done the King, the charge was found only relevant to infer an arbitrary pain^r. Yet, that the shot did not take place upon the person at whom it was aimed, could not have affected the judgment of the Court with respect to the pains of law for such an attempt, if in itself it had been a capital offence. A few years after, on occasion of the murder of Sharpe, a statute was indeed made, the act 1681, c. 15. which denounces the pains of treason not only against assassins, but against all who shall assert that it is lawful to kill upon difference of opinion, or on account of service done to the King, or to the established church. And from the latter part of this enactment, occasion might have been taken to argue, that for the higher offence of attempting to assassinate, or to kill

^r " And sickenlike that article of the dittay, anent the invading, wounding and " mutilating of the Bishop of Orkney, relevant to infer an arbitrary punishment."

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kill *per insidias et industriam*, (for this with us seems to have been the construction of that term), the offender could not escape with a lighter pain. But this statute has been taken away, in consequence of the general alteration of the Scottish system of treason law ¹.

Attempt to poison, if capital.

THE only controversy on this head, of which it is worth while to take particular notice, relates to the case of an attempt to poison; in regard to which, Mackenzie ² hath said that it may be punished with death; at least in aggravated cases, as when directed against a parent, a magistrate, or a master. But the statutes 1450, c. 31. and 32. upon which chiefly this opinion is grounded, have no relation to the users, but only to the homebringers of poison; besides, that even in the matter to which they properly related, the rigour of those laws does not appear to have been in any instance applied. It is true, respecting the attempt to poison a parent, that this opinion may farther be strengthened by the example of the Roman practice, which seems to have punished the child with death, who bought poison with the purpose of administering

¹ See the case of John Murray, 9th August 1703, where attempt to murder, laid to be done in the way of insidiating, and by firing with a gun, and thrusting with a sword, is found only relevant to infer an arbitrary pain.

On the 8th March 1756, John Ogilvy for stabbing a person with a knife, in the belly, and giving him a dangerous wound, was adjudged to be transported for life.

On the 8th July 1771, Thomas Young had the like sentence, on conviction of stabbing Henry Balmairs in the side, with a knife, as he lay asleep. The man's life was only saved by the knife striking a rib.

They have a statute in England by which it is a capital crime to shoot at a person with intent to kill. But it does not extend to this country.

² B. 1. tit. 8. No. 5. and 6.

administering it to the father, *quamvis non potuerit dare.* HOMICIDE.
 But notwithstanding the extreme depravity of such a purpose, it does not seem to be certain, that upon this single authority, which is borrowed from a state of manners, and of domestic discipline, very different from ours, we shall be disposed to judge in this instance, contrary to the general analogy of our law. Upon the ordinary and less atrocious case, two judgments have been given. In the noted trial of Dr Elliot, an attempt to poison was found relevant to infer the pains of death, but only in conjunction with a most malignant conspiracy to fix the guilt of that crime upon two innocent persons ¹. And in the later case of Walter Buchannan of Balquhan, who was charged with two attempts to poison Jean Dougal, liferenter of part of his estate, this article, *per se*, was found only relevant to infer an arbitray pain ².

Jan. 15. 1694.

Jan. 15. 1728.

NEXT; it must be shown that the person died of the harm or mischief libelled; of that whereof the pannel was actor, or art and part. For though a person be severely wounded, yet if he recover of the injury so as to come abroad, and engage in his ordinary occupations, there is no reason why his death following afterwards, which in these circumstances must be presumed to be from some other cause, should be the ground of a charge of murder. Judgment was given to that purpose in the case of Patrick Kinninmonth, upon

Person must die of the harm libelled.

Nov. 22. 1697.

on

¹ "As also, find the pannells giving poyson to Marion Maxwell the other pannell, at her desire, to be applyed to the body of Jean Sands, spouse to Daniel Niccolson, with the endeavouring to fix a design upon the said Jean Sands and her sister of poysoning the said Daniel Niccolson, another of the pannells, relevant to infer the pains lybelled."

² And further, the said Lords find "That the said Walter Buchannan having, at either of the times libelled, attempted to poison the said Jean Dougal, relevant to infer an arbitray punishment."

CHAP. VI.

on that article of the libel, which relates to the slaughter of Andrew Glasford¹.

But even cases of a far more delicate nature must be decided in the same way. In a combat between John and James, John receives a wound of that sort which either may or may not prove mortal, and James flies for his safety, and leaves John upon the field, to the care of his own friend. If in these circumstances they are surprised by ruffians, who strip and rob John, and beat out his brains; no charge of homicide will on that account lie against James, whose act has indeed given occasion to the catastrophe, but is not the act by which John has been killed. Or again: a person of a weakly habit receives a wound, of which, after some space of time he is cured; but owing to the pain and confinement, he is taken ill of a consumption or other malady incident to a state of weakness; and of this he dies. It may be very true, that the author of this calamity has great cause of compunction and distress of mind; but it is only in that sort of suffering that his punishment in this world must lie. Inferences of this kind are by far too remote, and too uncertain, to be made the grounds of judgment in human tribunals; and as even in the civil question of deathbed, those ailments would on that account be held to be distinct, much more must the same rule be followed in the trial of a person for his life.

Person must
die of the harm
libelled.

IN the case, accordingly, of James Mitchell already mentioned, though the libel relates that the Bishop of Orkney
“ did never recover his health to that measure and vigour
“ that

¹ “ And finds the defence of Glasford’s liveing two moneths and upwards after receiving the wound and going abroad about his business, relevant to restrict the indytmnt as to that article to ane arbitrary punishment.”

" that he had or might have had, if he had not gotten the
" said wound, and he was mutilate and dismembered of his
" arm and hand, so that he could make no use of the same,
" but languished thereof until he died ;" yet all this is not
found relevant to infer the pains of death; nor indeed is
it even charged as homicide in the libel.

HOMICIDE.

MUCH the same case it is, if a person receive some slight
injury, in itself nowise dangerous nor difficult to be cured,
but which by the great obstinacy and intemperance of the pa-
tient, or by rash and hurtful applications, degenerates in the
end into a mortal sore; for the man here has killed himself,
and the first injury is nothing more than the occasion of
his deed. A defence of this sort was remitted to the assize,
along with the libel, in the case of William Mason; where
it was alleged for the pannel, that by refusal of proper reme-
dies, and by persisting to keep abroad in the night, and in
severe weather, the deceased had irritated a slight cut in
the head into a mortal complaint¹. In the older case of
Thomas Crombie, on the pannel's allegation that the de-
ceased had *misgoverned* himself, (as it is called), by hard
drinking, bearing company, and dancing at a bridal, con-
trary to the advice of his surgeon, the complainer judged it
prudent to depart from his prosecution.

Death *ex malo*
regimine.

July 13. 1674.

June 22. 1625.

ANOTHER set of cases, upon which the like judgment
must be passed, are those in which the violence sustained
L I from

Cause of the
Death must be
certain.

¹ " Finds the libel as it is libelled relevant only to infer *pœnam extraordinaria*, and remits the same to the knowledge of an assize; and also remits the
" defences proponed for the pannel, *viz.* that of casual homicide, self-defence,
" and that the wound was not of itself mortal, likewise to the knowledge of an
" assize."

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Nov. 10. & 17.
1707.

Aug. 11. 1697.

from the pannel is only one circumstance among others which have contributed to the fatal issue, and is such whereof it cannot be well ascertained, what its own proper operation in the case has been. There are for instance many situations of disease, in which any sudden disturbance and alarm, or a cup of cold water, or a glass of spirits improperly administered, may produce a great and unfavourable change in the state of the patient; who in the end dies. Yet even on the supposition that the thing is wickedly done, it will still be very difficult to convict the offender of murder; because the disease itself is here the main and primary cause, and it cannot be shown with that certainty of which the law is desirous in such enquiries, that it has only proved mortal, owing to this adventitious circumstance. Thus William Duff of Braco and others were indicted, at the instance of James Gordon, upon a libel¹ which sets forth that they had broken into his house, by way of haimefucken, to beat him, and that his wife being in childbed at the time, "she, by reason of the terror of the roaring and raging of the armed men about her," was thrown into a fever of which she died: it therefore concludes for a capital pain to be inflicted upon the pannels, as those who "by cruelly affrighting the poor woman, even out of her life, *mortis causam tribuerunt*." Now the Court dismissed this libel as irrelevant. In like manner, among other charges in the case of Patrick Kinninmonth, is that of breaking

¹ The major proposition has these words: "To invade them by open force in their own houses; and farther, with full terror, threats, drawn swords, and outrageous violence, as occasion the disordering and frightening of persons out of their lives, and death visibly ensuing, are crimes of a high nature, and ought to be severely punished; the said in law being chargeable on the principal convicator and invaders, as *præbentes causam mortis, i. e.* The fright whereof the person fevered and died."

breaking into a person's house and frightening his wife, who had been delivered three days before, so that the child died soon after, upon her breast, and to the great injury of her own health. The interlocutor sustains the injury done the woman as a ground of arbitrary pain; but it takes no notice of the death of the child ¹.

HOMICIDE.

THESE things have been received in favour of the pannel, to avoid the possibility of doing him injustice. But it is no less requisite to the due prosecution of the guilty, that this rule be also circumscribed on the other side, and that no exception be admitted of any situation, where the death of the deceased is the plain and direct consequence of that which is done to him by the pannel, whatsoever in other respects be the circumstances of the case. There are two descriptions of charge, which fall under this rule of judgment. One consists of those cases, where it may be argued, that the deceased was at any rate in a dying condition, and, according to the course of nature, had but a short time to live. And there can be no doubt, that the slayer has not in that circumstance any manner of defence. If a person who is old and bed-ridden, or in the last stage of a mortal disease, shall be stabbed with a lethal weapon, or knocked in the head with a stake, this is equally murder as to destroy in the same manner one who is in the vigour of years and health. Upon the issue of diseases, it belongs to none but unto God to determine; and granting that a certain judgment could even be formed concerning the event, still

What if the Person killed was on Deathbed.

L 1 2

it

¹ "As to the 4th article of the indictment anent the pannel and his accomplices entering Robertson's house, under cloud of night with drawn swords, the frightening Robertson's wife, and wounding of her and her daughter, find the same relevant to infer an arbitrary punishment." Nov. 22. 1697.

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Mar. 12. & 24.
1713.

it is true, (and therefore the charge of homicide must be good), that the pannel hath actually taken his neighbour's life; a deed in which there is no difference of degree from the amount of the harm which is thereby done, but only from the motive which impels to it. Upon this matter, the case of Jean Ramfay is an authority in point. The libel relates, that Robert Ramfay, a sickly and infirm person, being found lying upon the street of Leith, was charitably carried from thence into the pannel's house, and laid upon a bed; from which the pannel, on coming home, violently dragged him, and beat him with a pair of tongs; and that she repeated this usage when he was laid upon the bed a second time; whereby, in a few hours he died. This was found a relevant charge to infer the crime of murder¹; though it was argued for the pannel, that the event was rather to be ascribed to the previous condition of the man. She was not, however, convicted of the violence, in the extent which the interlocutor required; and therefore she escaped with sentence of banishment and scourging.

What if the
Wound might
have been cured?

THE other class of cases are such, concerning which it may be argued or conjectured, that in more favourable circumstances than those in which the violence was offered, the injury might not have had a mortal issue. And in general it seems to be true, that as little can there be any allowance

¹ "The Lords find the pannel's violently dragging the defunct Robert Ramfay, a weak and infirm person, out of the bed on which he was laid, so that his head was bled on the bed-stock or floor, and her beating of him on the side with a pair of tongs, and her *again* dragging him out of another bed, whereon he was afterwards laid, and his dying within a few hours thereafter, about the time libelled, *jointly*, relevant to infer the pains of death, and confiscation of all her moveable goods and gear; and find any of the foresaid facts, separately, relevant to infer an arbitrary punishment."

HOMICIDE.

lowance of this sort of plea. If an assault is made with a knife, or other cutting weapon, whereby some artery or blood-vessel is divided, and the person bleeds to death upon the spot; it is no answer to the charge of homicide, that of itself the wound was not necessarily mortal, and that with the instant assistance of a surgeon, if he could have been procured, the effusion of blood might have been stopped, and the man's life preserved. Or put the case, that a surgeon is procured, who staunches the blood for the time, but that after his departure the wound breaks out a-fresh, and the man dies before assistance can again be had; this incident also is at the hazard of the pannel. Or what if a person receive a gunshot-wound at some remote place in the country, where no surgeon skilled in the treatment of such wounds is to be had, and of which wound he dies, notwithstanding the best care of the practitioners in that quarter. Or let us imagine that a person is robbed, and unmercifully beaten under night, in severe weather, and in a solitary place, so that lying exposed to the cold throughout the night, he dies upon the spot, or of the consequences shortly after. In all these, and the like cases, there is an undoubted homicide. It is still true, that of this very injury, done him by the pannel, the person dies. It has had its natural course and issue, in the circumstances of the situation, such as they happened to be where the pannel did the deed, and which the party suffering has done nothing to aggravate, and every thing in his power to relieve. If these have been unfavourable, this he must answer and run the risk of, whose malicious deed, then and there done, has made them of moment to the loss or preservation of the life of a fellow creature. Besides, the uncertainty must be considered, which always hangs about such cases of great and outrage-

ous.

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ous injury, whether by any course of treatment, the life of the person could have been saved. The actual destruction of him by this violence is proved; and that he would have survived in more favourable circumstances, is matter of conjecture only, or of probability at the best.

What if the
Wound might
have been cured.
June 30. and
July 6. 1747.

ONE case which serves in some measure to illustrate this rule, is that of David Edgar, tried for the murder of William Paisley, officer of excise. Edgar was one of a party of smugglers, who had fired at Paisley in the exercise of his duty, and wounded him with small shot or slugs, in the leg or knee. The man was attended by a surgeon, the best that could be had in the village whither he was carried, and who was not alleged to have been deficient in attention: nevertheless a great collection of matter having formed in the leg, below the wound, and fever having ensued; at the end of three weeks the man died. Now this, it was objected for the pannel, was not a relevant charge of murder: In as much as the wound (it was said) was of that nature, and in such a place, that with skilful treatment it might have been cured, and could not justly be supposed to be the cause of the person's death, especially at such a distance of time. It was answered, that the pannel might prove, if he could, that death ensued *ex malo regimine*, and not from the nature of the wound; but that otherwise his plea was naught, if the proof upon the prosecutor's part should come up to the showing of his libel. The Court found the libel relevant to infer the pains of law. But the proof was not conclusive against the pannel, as the person who inflicted the wound; and he had therefore a verdict in his favour.

THIS

THIS case gives occasion farther to remark, that though death do not ensue for weeks or months, yet if the wound be of itself severe, and keep in a regular progression from worse to worse, so that the patient continually languishes thereof, and is plainly consumed by it as a disease; this in reason, and in law, is all one as if he died upon the spot. A plea to the contrary was repelled in the case of Edward and James Scrymgeour; where the deceased had been wounded in September, and survived till the succeeding January¹. As it also was in the case of John Young, indicted for slaughter, by striking a person "with a whinger on the "shakell-bane" in the month of June; of which wound he died in October. Again, in the case of William Lewis, where it appeared from the libel that the person had lived for seventeen months after the injury, the charge was nevertheless sent to an assize², along with the defence, that he had reconvalesced and appeared at kirk and market. Witness also the pointed interlocutor in the case of Peter Leith, who was accused of wounding the deceased with shot or small flugs, in the arm or shoulder, whereof he died at the distance of three months. This the Court "find "relevant in thir terms, viz. that after the defunct received the wound he languished thereof constantly from "evil to worse, till he died of the same; and find that the "defunct died of the wounds relevant to be proven by "physicians

HOMICIDE.

Case of Death
at a Distance of
Time;

Nov. 27. 1618.
and
Jan. 15. 1619.
July 30. 1630.

April 18. 1610.

Nov. 15. 1686.

¹ " The Justice repells the haill allegations in respect of the dittay and answers made by my Lord Advocate in fortification thereof, and ordains the dittay, which is found relevant, to pass to the knowledge of ane assize."

² " The Justice remits this matter to the assize, to be tried and cognosced by them according to their knowledge and conscience." The assize acquitted the pannel.

CHAP. VI.

Feb. June, July
1737.

“ physicians and skilful surgeons only.” Add to these the case of John Caldwell, who had robbed the mail, and with some sharp instrument violently cut and abused the post-boy. The lad lay on the ground all night, and suffered severely by the cold, the loss of blood, and the pain of his wounds, so that thenceforward he was feverish and hectic, and growing daily worse, died at the end of two months. The Court found a relevancy on the charge of murder as well as robbery¹. It was given in evidence by a surgeon, that the boy had received a deep wound in the thigh, “ and that the above wound, with the cold that the “ defunct got by lying out all that night he received it, and “ the great loss of blood that followed on it, was the cause “ of his death.” The jury found him guilty of the *crimes* libelled; and he was condemned and executed accordingly². This, upon the whole, was not very remote from the case of William Sommerville, taken notice of by Mackenzie, where, according to the evidence of the surgeon, the deceased “ had “ a wound in her forehead, and that the wound of its own “ nature was not mortal, but that the fractious contusions “ and ruptures, joined with the wound, could not be cured, “ and that he used his art for mending of it; that the “ wounds

¹ July 28. 1737. “ The Lords find, that the pannel having, time and place “ libelled, seized the mail or packet coming from Glasgow, or that he robbed the “ same, or robbed James Johnston the post-boy of all or any of the particulars “ respectively libelled, or that the pannel did give a mortal wound to the said “ James Johnston, whereof he afterwards died, or that the pannel was art and “ part of any of the foresaid crimes, *separatim*, relevant to infer the pain of “ death and confiscation of moveables.”

² In the case of David Pretis, who was convicted of murder, by wounding with a knife, the surgeon swore, that for three days the man seemed in a way of recovery, but then fevered, owing to the wound, and died. January 19. and February 2. 1730.

"wounds joined with the fractions was mortal and uncure-
able, *and brought a symptomatical fever on her*, which con-
tinued to the time of her death." The hardship in this
case, and which in the end procured a pardon for the pannel,
was in the refusal of the evidence offered on his part, to
show that the fever was contracted at a distance of time, and
from another cause¹.

HOMICIDE.

How right soever these judgments upon the cases in which
they were given, it may however be alleged, that there
ought to be some rule of limitation in this matter, (such as
they are said to have in England to the space of a twelve-
month) grounded on the circumstance of the period at
which the death takes place: Because where the illness is

Is there a limit-
ed period in that
article.

M m of

¹ I shall here observe, that though such has always been anciently the course
of judgment, yet nothing was more common in criminal pleadings than argu-
ments of a very different complexion; in so much, that I again and again find
it objected to a libel, that it did not characterise the wound as *mortal*, although
it related and set forth that of this wound the deceased died. Thus, in William
Davidson's case, (12th July 1726), the pannel argues, "It is not enough to say
that Hutchinson *died* of the wound, for every wound after which death may, or
even did follow, is not to be esteemed a mortal wound. The essence of which
consists in this, that a man *cannot* receive it, and at the same time have the
possibility of living." Again in William Cob's case, 1st February 1720,—
"The giving of a wound, if it is not a mortal wound, though a person should
chance to die thereof, the crime of murder will not be inferred;" and with
this plea the information is chiefly occupied. In this the lawyers were taking
advantage of the arrangements of books of surgery; where wounds are found
classified into such as are, or are not, mortal; and they endeavoured from thence
to argue, that wherever a person died of a wound, not belonging to the mortal
class, it must have been *ex malo regimine*, or through misconduct. We find, in
like manner, that in the case of Sir John Shaw, 20th February 1716, upon an
indictment for assaulting and wounding, three physicians and two surgeons swear,
that "by the rules of their prognostick," the wounds received by James Houston
were mortal. Now Houston was alive, and pursuer in the very process where
these gentlemen deponed to this effect.

CHAP. VI.

Nov. 22. 1697.

of very long duration, it is difficult to trace the influence of the original injury, and its connection with the final issue, in that clear and palpable manner, which is to be wished in the investigation of crimes. But with us, so far as I can learn, (nor have I observed that this course has ever been attended with injustice), that circumstance has not been considered any otherwise than as one among others, in the sum of evidence upon the case. It is true, that in the trial already mentioned of Patrick Kinninmonth, where certain injuries done to the person of Walter Anderson are charged as the cause of his death, which took place at the distance of more than fourteen months, the libel, as to this article, is found only relevant to infer an arbitrary pain. But this, as far as I can judge, was rather on account of the nature of the injuries themselves, which, as related in the libel, are more of the description of indignities, less intended to injure, than to vilify and degrade.

Killing of a
Child *in utero*.

THIRDLY, The slaughter must be of a person, or existing human creature. Wherein is excluded all procuring of abortion, or destruction of future birth, whether quick or not; because, though it be quick, still it is only *pars viscerum matris*, and not a separate being, or such of which it can with certainty be said, whether it would have become a quick *birth* or not. It is no doubt true, that on the 10th November 1606, Patrick Deanes had sentence of death for the slaughter of his wife and a child in her womb. As also, on the 12th February 1631, Thomas Davidson and Effie Gibb had the like sentence, for the murder of Elizabeth White, Davidson's wife, "and the bairn in her belly being "near to the full time." And again there is the case of

Dec. 18. 1627.

Patrick Robertson and Marion Kempt, for notour adultery and

and the administering and taking of a *poisonable draught*, (as the record calls it), wherewith she destroyed her child in the womb. But in all these instances, another and a capital crime concurred with the destruction of the child; and it cannot be known from the short and general expressions of the record, that the latter was found relevant as a murder by itself: Neither have I found any instance of that description in later times. One case is indeed stated in some of the English books, upon which there may be room for argument against the prisoner; the case of a child which is born alive, but dies immediately upon the birth, in consequence of evil medicines, which have previously been administered to the mother¹. But it is difficult to imagine, (and no more needs be said on the case), that in these circumstances a decisive proof shall ever be obtained of the true cause of the death of the child.

HOMICIDE.

HOWEVER this may be decided, (if the occasion shall ever happen), it is certain that no distinction is taken in regard to the creature killed, from any circumstance which may be thought to lessen the value or importance of the life that has been taken away. There is the same law for it, whether the deceased was of sound intellects or insane, a native subject or an alien, a Christian, a Jew, or an infidel, a true man or a known criminal, one at peace with the church or an excommunicated person. With respect however to one class of persons, namely, persons who have been proclaimed rebels, (or denounced at the horn, as it is called), for criminal causes, this has only become our law in later times. For it appears, that according to the more severe notions of our

All one what
the person kill-
ed is.

M m 2

older

¹ Hawkins, b. 1. c. 31. No. 16.

CHAP. VI.

Slaughter of one
at the Horn.

1540, c. 97.
1592, c. 146.

older jurisprudence, no process could be maintained for the slaughter of a person in that condition; not by the King, who had not lost a subject, or person at his peace and faith, and as little by the relations of the deceased, who by sundry statutes were forbidden to harbour, comfort, or have intercourse with him, under pain of death, or at least under the like pain to which the rebel himself would be subject on conviction. Strange as it seems to us, this defence was explicitly sustained in the case of Thomas Cranstoun of Morioustoun, and others, tried on the 17th June 1606, for the slaughter of William Broomfield, who was at the horn for houghing of oxen. The proceedings are entered in the record as follows. "It is allegit for the pannell, that this
"matter can nocht be put to the knowlege of ane assise, in
"respect umquhile William Brunfeild for quhais slauchter
"they are presentlie persewit war the tyme of the said
"slauchter his Majestie's rebellis, and at the horne for ane
"criminal caus, viz. hocking of oxen, and therefor na pro-
"ces can be led againes them, and for veresieing of the said
"alledgeance, produceit the letters of horning, of dait the
"28th of May 1586, deulie execute, indorsat and regrat,
"and tuik instruments of the production thereof. . . . The
"Justice fund na proces, in respect of the horning, quhair-
"upon the pannell askit instruments. The pannell protestes,
"that the using of this horning prejudice thaim nocht of
"the rest of their lawful defenses."

Slaughter of one
at the Horn.
July 31. 1605.

THE same decision was substantially given in the case of Johnston against Graham; where the Justice on considering the defence, and certain objections stated to the horning in reply, "remitts the decision of the nullity or validity of
"the horning to the Lords of Session, and giff the horning be
"null

“ *null by the Lords*, ordains the pannell now to find caution
 “ to enter before the Justices upon fifteen days warning,
 “ to abide a trial for the said slaughter.” In the case too
 of Hector Turnbull and others, the prosecutor does not dis-
 pute the relevancy of the defence, but replies on certain nul-
 lities in the horning, and on a lawful relaxation from it;
 which last reply is sustained ¹, and one of the pannells is con-
 victed. Neither does it seem to be certain, what Mackenzie
 says on authority of the judgment in the case of Robert
 Achmooty, that this licence did not excuse the slaughter if
 committed on a private quarrel, or from motives of revenge.
 It rather appears that the reasons of the practice were inde-
 pendent of any such consideration; and indeed in that
 trial other defences were far more strenuously urged, and
 chiefly this, that the horning was already reduced and set
 aside by decree of the civil Court ².

HOMICIDE.

Dec. 18. & 19.
1601.

June 5. & 9.
1600.

NAY more, and which serves to confirm these prece-
 dents, the like plea had even been set up in cases of horn-
 ing for civil and pecuniary causes; as is plain from a
 debate at large upon that matter, in the case of William
 Douglas of Drumlanrig, who being indicted for the ta-
 king and imprisoning of a free liege, defends himself on
 this ground, that as such a one may lawfully be killed,
 much more may he be imprisoned. It appears that this
 pretension, which was not so void of support in specious
 arguments of law, as in reason and in substantial justice,
 had

Slaughter of one
at the Horn for
a civil cause.

Dec. 21. 1611.

¹ The precise same reply occurs in the case of Hector Bannatyne, 24th July
1600; but on this no judgment was given.

² Besides, the King had directed two several warrants to the Court, ordering
them to proceed in the trial without delay, and refusing, before hand, to receive
the pannell into will, if he should make any tender to that effect.

CHAP. VI.

1612, c. 3.

had given occasion to some alarm concerning the extensive consequences into which such a doctrine would have led: at least this may be conjectured from a letter of the King's, (recorded on the 24th April 1612), which absolves the pannel from the prosecution, on condition that he renounce his said defences, and consent to their being expunged from the record; "insisting in the meane time earnestly, that thouse uthir exceptiones heretofoir usit in his defence being so dangerous, and by no presedent warranded, may not heiraftir be recordit in the registeris of adjournall as lauchful or tolirable defences, to be proponit in the like caifs in ony tyme cuming." It was not however thought proper to trust to this security: for truly the principle went alike to both cases; the person being equally a rebel to the royal will, whether he disobeyed a civil or criminal process. In the same year a statute was therefore made, which cut short this controversy, and declared, that in cases of slaughter or mutilation no such defence should be admitted. In the end, this barbarous and extravagant doctrine was retrenched to the due bounds, by the statute 1661, c. 22. which only permits the slaughter of declared rebels for capital crimes, and only when done in pursuit of them to the ends of justice, and upon their forcible opposition. Indeed it would be a strange condition of the law, if a private and unauthorised individual could with impunity, and on his private quarrel, kill a person against whom there is no conviction on record, and yet the magistrate be guilty of murder, who varies from his warrant in the execution of the sentence of death.

Killing; the several ways of it.

LAST of all, as to the way of killing; this general and necessary limitation must be acknowledged, that the manner of the death be such, wherein the act of the pannel plainly and

HOMICIDE.

and palpably, and not by suspicion and conjecture only, appears. It may be true, that in adhering to this rule, we shall leave unpunished those many modes of unkindness, ingratitude, treachery, and oppression, by which, in too many cases, the heart as well as health is broken, and the sufferer conducted to the grave, by a longer and more painful passage. But the reasons are obvious, why these transgressions, how deep soever, cannot be vindicated in the tribunals of this world.

OTHER than this unavoidable restriction, there seems to be none with respect to the way in which the person is destroyed. It is equally a homicide, whether the deed be done by the very hand of the pannel, as in shooting or stabbing, or by his exposing the deceased to the operation of some destructive power; as by confining him to a dungeon without food, or by setting fire to the house where he is asleep, or by fastening him to a rock in the sea, and leaving him there, to be drowned by the flood¹. Another illustration of this more indirect, but not less cruel sort of homicide, is in the case of a new born child or infant, if it be cast out into the fields, in the night, in a solitary place, and in rigorous weather, there to be consumed with cold and want of food; for this treatment not only shows an utter indifference about the fate of the child, but is a deliberate selection of the very circumstances that are fitted to extinguish life. A charge of this kind was found relevant in the case of Helen Wilson, who is stated.

Killing of Infants by exposure.

July 16. 1722.

ted.

¹ This illustration was suggested by the narrative of the libel in the case of Neilson and others, (16th June 1620), which bears, that they bound the deceased hand and foot, and carried him in a boat "to the Craig of Classinellie, where having left him, the sea overflowed the said Craig, and so he was *pitifully drowned and carried away to the main-ocean-sea.*" This libel was not prosecuted to a trial.

CHAP. VI.

Mar. 10. 1679.

Mar. 20. and
April 10. 1699.

ted to have left her child, of fifteen months old, naked, or slenderly clothed, in the night, upon a rock in the sea, called Lammer Island, where it was next morning found dead ¹. A similar charge had been made in the older case of Margaret Smith, Margaret Henryson, and Catharine Scott, two of whom were convicted, and hanged. These women, on the birth of the child, which was in the night, and in severe weather ², had laid it upon the stone-floor of the apartment, where having lain for three hours, naked and unassisted, it perished in their presence. There is also an instance of relevancy found upon the exposure of a person of riper years. Elizabeth Key was indicted for the murder of Agnes Stewart, her apprentice, a girl of eleven or twelve years of age, by carrying her out under cloud of night, when sick and ailing, and exposing her in the open air; whereby she died through cold and hunger. This was found relevant to infer the pains of death, though the exposure was in a public street of

¹ 23d July 1722. The Lords "find, that the pannel having, the time and place libelled, thrown down John Bruce her child from a rock, where he was found dead next morning; or her leaving and exposing her said child upon the rocks in the night time, where he was found dead next morning; or her having the time libelled carried out her said child under cloud of night, and returned soon thereafter without the child, and giving false and various accounts about the child to those who enquired after him, and the child next morning being found dead upon the rocks, all three of the alternatives, *seperatim*, relevant to infer the pain of death, and confiscation of moveables."

² "And so cruel and unnatural were all the said persons, that though the child was a living and a strong child, yet they took no care thereof, but left the women naked and undressed, crawling upon the floor of the said Margaret Smith's house, in a cold and frosty night, by the space of three hours, and thereafter carried the said infant to the south side of the Cannongate, and left the women in the furre of a ridge upon the snow, because they could not get it buried, the frost being hard."

of a considerable town¹. One can imagine other situations, though not so likely to happen, in which the same judgment shall be due. If a goaler shall deliberately confine a prisoner in the same cell with an outrageous madman who is unbound, or with a person who is dying of some known malignant and contagious disease, or shall wilfully thrust him into a loathsome and pestilential dungeon, where he sickens, and shall refuse to remove him thence, though he observe the dying condition of the man; all these acts are in law, equally as in conscience, proper instances of the guilt of murder. One situation more, which may seem to have a near affinity to these, and which in the Roman practice was classed along with them², is that of the person who bears false witness in the trial of another for his life; if in consequence the accused be condemn'd and suffer death. That the guilt of such a conspiracy is equal to that of murder, and truly far exceeds the ordinary instances of it, in as much as it is an act of deeper contrivance, and more deliberate and continued malice, will not admit of question; and cases may easily be imagined where the dependence of the conviction on the particular testimony of the pannel shall be sufficiently plain, to set him down as the undoubted author of the death of his fellow creature. Also, all uncertainty of this inference may be avoided, by using the jury on the former trial as witnesses; who, if they concur in swearing that by the pannel's testimony they were chiefly influenced to con-

HOMICIDE.

False Evidence on a capital Trial.

N n demn,

1 " The Lords find the indytment, as lybelled, relevant to infer the pain of
" death againſt the pannel; and alſo find, that if ſhe carried out the child, after
" ſhe was dead, as is lybelled, relevant to infer an arbitrary puniſhment." On-
ly the laſt part of the interlocutor was found proved; and the pannel was ſet up-
on the Tron, and baniſhed Scotland.

^a Dig. Lib. 48. tit. 8. l. 1. No. 1.

CHAP. VI.

demn, and that but for this they would have acquitted, seem to furnish all that is needful, to make up the due measure towards his conviction. I have not however found any authority, which introduces this construction into the Scottish practice; and perhaps there are considerations, of expediency at least, upon the other side, to outweigh these reasons in the natural malignity of the act¹. Besides; as Montesquieu has justly observed², there is less need of a capital pain applied to this offence, in those systems of law, which, like that of Scotland, furnish innocence with so many resources, and are open to the admission of all manner of proof on the part of the pannel, equally as on that of the accuser.

Homicide; its
several kinds.

II. HITHERTO, of the common qualities, wherein all homicide agrees. Next of the several degrees of homicide; which seem to be principally four; though perhaps not fully distinguished in our practice by appropriated names. There is one sort of homicide, which is free of all blame, and does not expose to any manner of pain. Another sort of homicide cannot indeed be capitally punished, yet being in some degree blameable, is subject to censure, greater or less, according to the measure of the fault. The third sort of homicide is murder, and is punished with death. In the fourth division are comprised those cases of aggravated murder,

¹ Conviction of murder was obtained upon such a ground, in England, in the case of Macdaniel and others, in January 1754. But on motion in arrest of judgment, sentence was delayed in order that the law might be more fully considered. In the end, the Attorney-General declined to argue the question; and the men were in consequence discharged. Foster (p. 131. 132.) seems to think that the conviction was not right. Blackstone (b. 4. p. 196.) says that the prosecution was only dropped for prudential reasons. See Leach's Cases, No. 18.

² Esprit des Loix, liv. 29. c. 11.

der, for which, to mark its abhorrence of them, the law has appointed a more rigorous mode of execution, or some indignity or farther injury, beside the loss of life. HOMICIDE.

FIRST, therefore, of the lowest degree of homicide, that for which the killer is not liable to any sort of pain. This subdivides into two species; being either *casual*, that which happens by pure misadventure, without any act of the killer's will; or *justifiable*, which is committed intentionally, but may be vindicated upon principles of duty.

To bring his case within the description of *casual* homicide, it is not sufficient for the pannel to show, that he had no fixed and absolute purpose to kill. For if he had a purpose to do any great and outrageous bodily harm, such as might issue in death, and showed an utter indifference about the safety of the sufferer; this is not only not innocent, but it is nothing less than murder. We shall afterwards see, that the books of adjournal contain many precedents to that effect. Casual Homicide; what it is.

FARTHER; where there is a wrongful purpose to do any bodily harm, though not outrageous or excessive, still if the event fall out unfortunately, so that it kills, the invader is not entirely innocent of the blood of the deceased; since he is thus far blameable, that he did a thing which was wrong and unlawful in itself, and which could issue in the destruction of his neighbour. It is an example of this, if without provocation a person strike a single blow with the hand, and it lights unluckily and kills; or if he violently jostle or push a person aside, whereby he slips a foot, and breaks his neck in the fall, or has his skull fractured, and dies. We shall find, in speaking of culpable homicide, that we have also many precedents of punishment, more or less, inflicted

CHAP. VI.

in cases of this description, according to the degree of the wrong.

Casual Homicide, Limitation of.

IN both these situations, there is a purpose of some sort of harm to the person who actually suffers. But the same holds equally good, if the homicide is done in prosecution, generally, of any wrong and unlawful act, though without malice to an individual. As if a person fires a gun, loaded with powder only, in the streets of a town, and the gun bursts, and a passenger is killed; or if a piece of metal or other hard substance, has ignorantly and accidentally been put into the gun in loading, and death ensues; for the firing of a gun in such a situation is absolutely wrong and unlawful. This last was the allegation made in the case of James Niven, who had killed by firing his piece, loaded (as he said accidentally) with a bit of iron, in a street of common passage, and at a time when several persons were near him, and in fight. The Court were unanimously of opinion, that even upon his own state of the case, he would still be guilty of culpable homicide. But the jury acquitted him of the whole charge¹.

Dec. 21. 1795.

Casual Homicide, Limitation of.

LAST of all, some punishment is due, though the slaughter happen in the performance even of a lawful act, if there be culpable heedlessness and indiscretion, or a want of the due caution and circumspection, in the way of doing the thing. As if a man leave his fowling-piece loaded, and afterwards kill in trying the lock, having forgot the condition in which he left it. Or if in driving any carriage through the streets of

¹ This case is erroneously quoted in p. 6. as tried in March 1796. Notes of the opinions of the Judges in this case are printed in the Appendix.

HOMICIDE.

of a town, the driver quit his horses, and they run off with the carriage, and a passenger is killed. Or if workmen upon a building by the side of a highway, throw down rubbish without timely warning to the passenger, that he may avoid the danger. In all these cases, there is a want of that attention, and due regard to the safety of one's neighbour, which justly makes one answerable for the consequences, and punishable to that extent which may serve to correct so faulty a habit of mind, either in one's self or in others. Hereunto must be referred that judgment of relevancy, as for culpable homicide, which was given at Stirling in April 1789, in the case of one Henderson, who being at a wedding, and having fired a pistol by the side of the highway, to salute the couple as they passed, happened to kill one of the party with the wadding only. The thing itself could hardly be said to be unlawful, being usual on such occasions; but the pannel was blameable in having fired so near, and with that position of his arms which was attended with danger to his neighbour.

THIS may farther be illustrated by one situation more, though not as yet tried in any of our Courts; that of a quack, or ignorant and unlicensed practitioner of medicine, who rashly administers powerful and improper drugs, or in excessive and unusual doses, or one drug by mistake for another; so that his patient dies. It may, and I believe it will be very difficult to find a case so circumstanced, as to be open to the application of such a censure. Yet it cannot be denied, that there is a high wrong, and criminal indiscretion in the conduct of such a one, who knowingly puts his neighbour to hazard, though in some measure with his own consent, by the use of such extraordinary prescriptions as may possibly kill, or by furnishing medicines, without the due skill to distinguish between

CHAP. VI.

tween the different kinds. But this I only offer as a doubt of my own.

Cases of casual
Homicide.

THE result of these considerations seems to be, that it is only then a proper casual homicide, when a person unintentionally kills, who is lawfully employed, and neither has a purpose of bodily harm to any one, nor has failed in the due degree of care for preventing danger to his neighbour. Under this rule falls the case of Samuel Hale, a soldier, indicted in December 1726, for the murder of his fellow soldier Rochford¹. It was pleaded for this man, that the deceased having his musquet in his hand, which, unknown to the pannel, was loaded, it discharged in the course of some sport or foolery that was going on between them. The Court sustained the defence; and it was fully proved, along with this circumstance in favour of the pannel, that while the deceased was lying in the pannel's arms upon his death-bed, he said, "That he verily believed that Samuel Hale" "knew not that the piece was loaded, and that he freely" "forgave him, and then stretched out his hand and kissed" "Hale, and said he believed he meant him no harm." The jury, in consequence, found a verdict of *not guilty*.

Cases of casual
Homicide.
June 24. 1673.

THOUGH the issue was different, the like exception had been found relevant in the older case of John Nicolson², who alleged that his piece discharged and killed in the course of a struggle,

¹ "Sustain the indictment relevant to infer the pains libelled; but sustain the" "defence of casual homicide, proponed for the pannel, and remit," &c. December 20. 1726.

² "Finds both the libel and defence relevant, and remits the pannel to the" "knowledge of an assize upon both."

struggle, in which the deceased was the aggressor, and had invaded his person. A more extraordinary case, and which ended favourably for the pannel, was that of John Leper. This man, in his duty as town-officer, had apprehended a person and carried him prisoner to the castle of Straven. On entering that building, which in some parts was waste and ruinous, the prisoner had hastily run up stairs before the pannel, who warned him of his danger, and was following him with a candle to conduct him to his place of custody; and in consequence, having mistaken the way, and passed through a door which opened from the stair-case, the prisoner fell down from thence into a paved hall or court-yard, to the depth of more than twenty feet, and was killed. The Court found this defence relevant ¹, and the man was acquitted. Notice may also be taken of the case of William Bathgate, who being indicted for the murder of Andrew Wood, by throwing him to the ground and beating him, had this defence sustained to him, that the fall happened in the course of a wrestling bout for sport, and was only injurious to the deceased, owing to his previous valetudinary condition ².

HOMICIDE.

Nov. 13. 1682.

Jan. 23. 1710.

THESE

¹ Interlocutor. "Sustains the defences proponed for the pannel, viz. that the defunct being carried to the Castle of Straven as prisoner, he went up stairs before the candle and the pannel, and that he was advertised before he came to the first door to beware of himself because of danger, and that notwithstanding he went up the stair and casually fell over the second door of the stair, relevant to elide the dittay."

² "The Lords find the libel, as libelled, only relevant to infer an arbitrary punishment; and sustained the defence proponed for the pannel, viz. that the throwing down libelled was only a wrestling out of no malice or ill design, but only for diversion, and that previously thereto the defunct was valetudinary and sickly, and in a habit of spitting blood, relevant to elide the libel."

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Justifiable Homicide, what it is.

THESE cases may serve as illustrations of the nature of casual homicide ; that which happens without the act of the killer's will. Next of that sort of homicide, which though intended, is justifiable ; and of which the description seems to be, that it is committed in the necessary prosecution of that which the killer hath a right and is bound to do.

Case of Judge giving Doom to die.

1. THIS is the situation of the Judge, who pronounces the sentence of the law on the malefactor, in pursuance of his conviction of a capital offence, and of the proper officers, who see that sentence duly put to execution. For the persons who officiate in either of these capacities, have no choice nor will upon the matter, but are the mere organs of the law, whose command they are necessitated to obey. To enjoy the full benefit of this indemnity, the Judge must however be such, whose office gives him cognizance of the offence which he has tried ; and he must have proceeded in the exercise of his powers, according to the known rules of law, and the settled order of his Court. A Sheriff, therefore, who should condemn to death for rape or fire-raising ; or any inferior judge who should presume to hold process for treason ; or any judge who should try for witchcraft, or should try for any capital offence without a jury ; would, in case of execution of his sentence, (if such a thing could happen), be guilty of a murder, so much the more blameable only as proceeding under colour and form of law. The same would be his peril, who should try and condemn for felony as Justice of the Peace, on the notion of his name being in the commission, when in truth it is not there, nor had ever been. That these persons have acted conscientiously, and in the belief of their respective powers, is a plea, (how available soever in matters of patrimonial damage), which

What if the Judge err.

which though it should even be true, the law cannot countenance or pay regard to. The mistake was gross and palpable; the occasion called for the highest circumspection; and he shall therefore be judged as if he had wittingly and maliciously compassed the death of the person who has fallen a victim to his ignorance or precipitation. With all this, it is not however to be understood, that every error of the judge with respect to the extent, or even the substance of his commission, is equally inexcusable, and puts him in the same hazard of his life. But with respect to situations of this character, which must always be rare, and the precise bounds of the allowance which the law will or ought to have of such irregularities; I shall not undertake the arduous task of conducting the reader through so difficult, and hitherto unexplored a path, or of supplying from my own lights, the defect of our records, which furnish no materials towards the decision of controversies of so delicate a kind.

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WHAT is true of the magistrate in the ordinary case, is no less so of the officer employed to execute the sentence; who, to have the protection of the law, must be the proper officer, to whom the execution of that sentence belongs, and has been committed. A mob, for instance, who break into the goal, and carry forth the capital convict and put him to death, are guilty of no lower crime than murder; though to save appearances, (but which only serves to make the abuse the more remarkable) they proceed in this scheme of vengeance on the very day, and in the manner mentioned in the doom. For in their hands it is not at all an execution of sentence, but an act of malicious and outrageous

Case of Officers
executing capital
Sentence.

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revenge

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revenge on the individual, as well as an open contempt of the magistrate, and of the established order of justice.

Case of Sentence executed by a wrong Person.

FARTHER, and which is not so strong a case: If the warrant of execution is addressed to the magistrates of a burgh, and they decline to execute the duty; how wrong and how prejudicial soever such conduct on their part, still no private person, nor even any other magistrate of that place or neighbourhood, such, as a Justice of the Peace, or the Sheriff of the county, can without his own peril interpose, to take the duty of execution on himself. Nay, it may even be maintained to fall within the same rule, though the sentence be executed at the proper time and place, and by the ordinary magistrate to whom in common course the *dead warrant* falls to be directed; if he proceed therein on sight only of the books of adjournal, or on report of the clerk of Court, or on common fame and notoriety, without such warrant actually made out and delivered to him. For this is a duty of that nature, which to be justified in performing, a person must be necessitated to undertake; so that he shall not be held free of malice, if he is forward to offer himself to it, or step out of the ordinary course of form and business, to intermeddle with or enquire about it. Somewhat a-kin to this, and to be judged in the same manner, is the case of a magistrate, who proceeds of his own knowledge, and without a new warrant from the proper Court, to execute a convict who has escaped from goal, and is not recovered till after the day appointed for his execution; though certainly if the magistrate appear to have acted conscientiously, and in the thorough belief of his powers, his case may be a proper object of the interposition of the royal mercy.

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IN conducting the execution, the magistrate is in like manner to be guided by the terms of the sentence, and warrant in pursuance thereof to him addressed. That is to say, any material and unnecessary variation from the warrant shall bring the case to be the same, as if the sufferer had not been under sentence of death. Thus if the magistrate shall burn a convict, whose sentence is to be hanged upon a gibbet; or, instead of a public execution, if he have him strangled privately in goal; or if he negligently let the day of execution pass, and think to make amends by executing the convict on some later day; it seems clearly to be such a homicide, for which the offender shall be answerable with his own life: seeing in all these instances there is a wilful variation in matters which are conditions of the sentence, and that his conduct herein shows a degree of *malus animus*, or criminal contempt and disregard, more or less, with respect to the unfortunate object of his unwarrantable proceedings.

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Cafe of Execution varying from the Warrant.

It is no less necessary to remark on the other side, that this rigour is only suitable to the ordinary case; where, if attentive, and in the due disposition of mind, the magistrate has it in his power to proceed according to the letter of his warrant. Where this is not so, and the obstacle is owing to the fault of others, not to that of the magistrate himself, it were against all reason to judge him by the same rules. Thus our sentence of death, by ordinary style, directs the convict to be hanged upon a *gibbet* by the hands of the *common executioner*, between the hours of *two and four*. But if the common executioner shall die, or run away, or refuse the duty when the day comes, and if the magistrate shall carry the sentence into effect by the hands of any other person, or

Execution varying from the Warrant.

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even by his own hands, if he can find no one to undertake the office, is it to be thought that he is therefore guilty of murder ; or is he not rather commendable for thus hindering the sentence of the law to be disappointed, which if delayed to be fulfilled for so trivial a reason, could not afterwards be at all put in execution ? Or if a mob rise and pull down the gibbet, and the judgment shall in consequence be carried into effect upon a tree, sign-post, or the like, as nigh as can be found to the ordinary place of execution, and with as near regard as the circumstances of the case allow to the terms of the sentence ; or if the multitude shall rescue the criminal, and keep him for a time in their own hands, so that the precise hour has passed before the last step of execution ; it seems that either this is no crime at all, (being done under the firm impression of right and duty), or at the worst it is a misdemeanour or irregularity, of a nature quite remote from the crime of homicide, and to which some very moderate censure only can be applied.

Homicide in
Suppression of
a Riot.

2. NEXT in degree to these, which are of the highest necessity of any, is the case of that homicide which is committed by a magistrate, or on his order, in suppression of a riotous assembly. Now, with respect to this matter, which shall be considered more at large under the head of riot, it is in this place only necessary to observe, that to maintain the King's peace, and disperse tumultuous convocations, and arrest the delinquents, is an undoubted and important part of the duty of every magistrate within his bounds ; and such, which if any one shall altogether decline, or be slack and slow to perform, he shall not stand acquitted of the public trust which is reposed in him. If, therefore, in his lawful and laudable exertions towards this end, he shall be opposed

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or resisted by the offenders, who will not desist, nor disperse, nor suffer themselves to be apprehended, but make head against the magistrate and his *posse*, and violently molest and hinder him therein, certainly he may make good his purpose by force, and at the hazard of their lives; so he do not employ such means unnecessarily, nor before the proper season. This is the clear doctrine of the common law, founded in reason and necessity, and without which the ends of government cannot be answered, and to which, according to all authorities ¹, the declaration of the riot-act makes no addition; farther than as it raises the bare continuance of the riotous assembly for a certain space into a capital felony, and thus determines a particular season, after which the rioters are more inexcusable, and the magistrate shall be more to blame, if he suffer the disorder to continue. In like manner, though the time limited in that statute be not expired, or though proclamation have not been made as there directed; yet if the multitude proceed to outrageous acts of violence against property or person, here also is the magistrate not only entitled, but obliged to interpose in aid and protection of the individual, and to repel this unlawful force with force, without consideration of the consequence to the invaders. For this too was always the common law, and can never be construed to be taken away by those new provisions which have been made for the more effectual suppression of tumults, and in enlargement of the ordinary powers of the magistrate. The incidents of this sort which have happened in Scotland, have been attended with such decisive circumstances in favour of the magistrate, as has hindered

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1st Geo. I. c. 5.

¹ See Hale, vol. 1. p. 53. 293. 495.; Hawkins, vol. 1. c. 28. No. 14. c. 65. No. 11.; Foster, p. 270. No. 2.; Blackstone, b. 4. c. 14. p. 179. 180.

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hindered them to be made, in any one instance, the subject of prosecution against him.

Homicide on
Resistance of
criminal War-
rant.

3. NEXT of homicide committed by the officers of justice, or their assistants, who are employed in the searching for and taking, conveying, or sure-keeping of persons charged with crimes. Upon this important article the doctrine of the law of England, seems by the concurrence of all authorities to be settled thus: That the felon who resists the officers of justice having warrant, or called by hue and cry against him by name, to hinder their taking him, or who being taken assaults them, or the goaler who keeps him, to make his escape, may lawfully be killed; nay that the same is even true of the felon who flies from execution of the criminal process, if he cannot be taken alive. This too shall equally be the rule, though the person against whom the warrant is, should truly be an innocent man; for he ought to yield himself to the justice of his country, and answer to the charge that is on record against him. Nor do I find that in this matter any distinction is taken from the sort of weapon, mortal or not mortal, with which the resistance or assault is made; but only the just and salutary caution is added, that the slaughter be necessary to the taking or recovering of the person. In judging however of this necessity, it is not to be understood that the officer of justice, like a private man, is obliged to give back on the assault or resistance: on the contrary, his commission justifies him in continually pressing forward to his object¹.

THESE

¹ Hale, vol. i. p. 481. 490.; Foster, p. 270, 271, 272, 318.; Hawkins, p. 70, 71.; Blackst. b. 4. c. 14. No. 2.

THESE rules seem to be grounded in reason and sound policy ; in as much as they tend to the preventing of broils, and to exalt the authority of the law, as well as to protect the persons of its ministers, and to insure the course of criminal justice. But that the practice of Scotland shall in all points be governed by the same considerations ; and, in particular, that it shall make the same allowance in the case of the felon barely flying from the warrant that is out against him ; or in general, that our law has in this article attained to the same maturity as that of England, cannot perhaps, upon the state of our records, be affirmed. Such precedents as they afford, are however, upon that side of the question. One is the case of John Gillespie and others, who were indicted for the murder of Major Menzies. The pannels were private persons, dispatched on a verbal order of the magistrates of Glasgow, in pursuit of Menzies, who a few hours before had committed a murder, and had fled. Having found him, they fired at and killed him, on his refusal to surrender, and preparation to resist them with a drawn sword in his hand ; but before he had made a pass or thrust at any of the party. The Court found the defence relevant ; and the pannels had a verdict in their favour.

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Homicide on
Resistance of
criminal War-
rant.

Dec. 24. 1694.

Maclaurin,
No. 8.

IN this instance, the resistance was with a mortal weapon, and by a person who was charged with a capital offence. But it is scarcely to be thought that there is room for any settled distinction in law, to be taken from these, the aggravating circumstances of the situation. That which in any case of resistance to a criminal warrant justifies the homicide, is the attempt, with probable success, to disappoint the course of public justice, and the contemptuous defiance of the powers of the state in this high and interesting part of public

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Resistance of
criminal War-
rant.

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public order. The necessity which the officer hath lain under to kill, is therefore, in every instance, to be judged of on the whole circumstances of the situation; and to allow his privilege in regard only to criminals of the highest degree, would be a pernicious, and indeed impracticable distinction, which would vilify, as well the law and the magistrate, as the person and commission of the officer, with the very persons whom they are employed to overawe.

THE case of Samuel Burch, tried in July 1748, seems here to be in point. This man was a sergeant in the recruiting service at Lanark. Where, happening to have a quarrel with one Ramage, an inhabitant of the place, the matter was carried before the magistrate of the burgh, who found Ramage in the wrong, and partly for that reason, but more on account of contempt of himself in the course of the enquiry, gave warrant to commit him. A multitude assembled to rescue Ramage; and Burch with his party, was ordered to assist in conveying him to gaol. In the course of carrying him thither, and upon the steps in front of the goal, the party were assaulted. Numbers of people pressed upon them, and the soldiers were struck with staves by Ramage as well as others; stones also were thrown at them, and at length, a drummer was pulled down the steps by the hair, to the ground; whereupon Burch drew his sword, and by threats and feigned passes, disengaged his party for a time. The attack was, however, renewed in the same fashion; some of the assailants, who had got higher upon the steps pushing him down, while others, who were below, pressed him the other way. In this situation, after striking certain of them with the flat of his sword, he at length made a thrust at one Aitken and killed him. This was the amount of the proof: upon which the jury found it proved, that
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what he did " was in self-defence, and in the execution of HOMICIDE. " his office." The strength of his plea lay, however, in the circumstance of duty. For otherwise the danger of his person was hardly to be reckoned of that imminent and pressing kind, which would have made a case of pure self-defence, to an individual, invaded in his ordinary business. The pannel was dismissed from the bar.

Maclaurin,
No. 54.

THIS high privilege of the officer and his party, who are employed in the taking or conveying of a criminal, is always to be received under the provision that he is bearer of a lawful warrant; granted by one who has cognisance of that matter, allowable to be issued on that occasion, and proceeded with by the officer and his party in due and reasonable manner. In any of which points, if there be a plain and gross irregularity; as if the warrant is not signed, or is signed by one who is not a magistrate for that district, or does not bear the offender's name, or if the officer has it not upon him at the time, or goes out of his bounds to execute it, or lays hold of a wrong person, or breaks up the door of a house in the night without demand of entry, or notice given of the warrant: In all these cases, being no longer within the rule of his duty, he forfeits the privilege of his office in this particular, and cannot be fully *justified* for any slaughter which ensues. Though, whether in every case of this description his guilt shall amount to murder, or sometimes only to some lower sort of homicide, is a separate and more difficult question; of which in its proper place.

What if the criminal Warrant be wrong.

It seems however to be the more reasonable sentiment, that the officer shall lose his privilege in the case only of

What if the Warrant be wrong.

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such vices, which are in the immediate frame and texture of the warrant; and that he is not affected by those more remote and extrinsic, and to him unknown and unsearchable irregularities, which have happened in the way of applying for the warrant, or in the proceedings which have been the grounds of obtaining it. A sheriff-officer kills upon resistance by a criminal, against whom there is an English warrant, which the Sheriff has indorsed, in compliance with the statute in that behalf. It is afterwards found, that the first warrant was not obtained in the due course of the law of England. Nevertheless, the Sheriff and his officer shall have a clear defence, being neither of them bound to know, nor entitled to enquire concerning the forms of issuing an English warrant; but the one necessitated to obey the command of his superior, as the other is to comply with the requisition of the law, upon proof made to him of the verity of the warrant, after the manner appointed by the statute. Or put the case, that the magistrate is imposed on by calumnious information, or, which is more unfavourable, that without any proper charge or information lodged with him, he on his own suspicion, rashly, or even maliciously, issues warrant against such a one by name, as accused of a high crime. This will not hinder the killing of him to be lawful, if he violently resist; for the officer can do no other than obey the order of the magistrate; and it is therefore the duty of the party to submit to him therein, and seek his remedy in course of law.

ON all occasions where the officer would be justified in killing the felon himself on his resistance, he shall equally be justified in killing those, (as in the case of Burch), who wilfully take part with the criminal, and by force obstruct and stay him in his pursuit. And what is true of the ministers

sters of the law themselves, seems to be no less so of their concurrents, lawfully commanded to assist them; so they may be known for such to the party resisting, and are not chargeable with any precipitation or excess in their proceedings.

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4. TOUCHING the case of process or diligence of a civil nature; there are plain and sufficient reasons why the officer should not be allowed so broad a privilege, as for the execution of criminal warrants, wherein not only is the public interest concerned, but the party is under higher temptation to withdraw himself from the law. In England therefore, the rule with regard to any pure civil process, or process on account of trespass is, that the party cannot be killed in flying from it, but on his resistance of it only¹. The doubt with us will not be, whether to go farther for protection of the officer, but whether we will go so far, and hold a messenger to be justifiable for such slaughter, as he necessarily doth towards the execution of a poinding, caption, or other civil diligence to apprehend. The following seem to be the chief precedents upon this matter, though perhaps neither so numerous, nor so conclusive, as might be wished in so interesting an article of the law.

Homicide on resistance of civil Process.

THE first is the case of James Gordon, messenger, and eleven others his assistants, indicted for the murder of Alexander Jack, whom they had shot in the execution of two captions against him, one of which appears to have been a caption of lawborrows. Their defence was twofold. 1st, The danger of their lives; having been invaded with

Homicide on resistance of civil Process.

July 20. 27. and 31. 1691.

P p 2

mortal

¹ Hawkins, b. 1. c. 28. No. 17. 20. Foster, p. 271. No. 3. Hale, vol. i. p. 481.

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mortal weapons, fired upon, and pursued from place to place under night by a host of people. 2dly, Execution of their duty¹; which last was sustained in these terms: "Sustain the defence for James Gordon, messenger, and his assistants, (except as to the said Mr Robert Keith of Lenth, in as far allenary as concerns the arbitrary punishment underwritten), in execution of the caption produced, in thir terms, viz. that the said James Gordon, messenger, having his blason displayed, was by force of arms hindered to enter the house of Longmay by the persons within that house, and that they did threaten and menace the person of the messenger, and his assistants, in the terms libelled, or by words to that purpose and effect; and that Mr James White, or one or other of the persons complained

* The pannel maintains his defence of deforcement to be good, "because the pannel coming to execute a caption, he was authorised by their Majesties authority, and being attacked in the execution, was thereby warranted to keep his post and defend against aggressors; and his being so warranted, did allow to him and his party a greater latitude of defence, especially when aggressed under cloud of night by armed men, who actually first shot, than if he had been first stated in the case of precise self-defence, *tanquam quilibet*. And to allege that the messenger finding opposition or resistance at the house, should only have broke his wand, and protested, and then might have insisted for his deforcement, as a distinct crime punishable by confiscation, it is *gratis dictum*; and the messenger was in *optima fide* to stay and wait his time for making open doors, conform to the warrant of the letters."

The pursuer answered, "That the defence founded on deforcement is noways relevant, seeing by our law deforcement is ane distinct crime, and punished with a distinct punishment, viz. by confiscation of moveables, and by coming into the King's will as to their lives. And therefore, although they had been deforced, which is positively denied; yet all that in law could have been done is, that the messenger should have broke his wand of peace, and protested for remeid of law; and therefore deforcement is noways relevant, unless that the messenger and his assistants had been in *periculo vite*, and could not otherwise have escaped."

“plained upon, did threaten to raise the country, with the
“expressions libelled, or words to that purpose, and that
“shortly thereafter the country did rise and beset and sur-
“round the messenger and his assistants, either in the house
“or without the house, the said country people being arm-
“ed with swords, guns, or invasive weapons, and that be-
“fore the committing of the slaughter; relevant to elide the
“libel *simpliciter quoad the messenger and his assistants*; Len-
“tush excepted as above.” This prosecution was deserted
by warrant from the Privy Council in November 1691.

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In the same year, William Fife, messenger in Paisley, and his assistants, were indicted for the murder of Andrew Wilson, an infirm old man, who had come forth in order to rescue his son-in-law, one Peoch, their prisoner, taken upon caption¹. This interlocutor was given on the defence and reply: “As also, finds the defence, that William Fife, messenger, and the other two pannels, his assistants, had
“Peoch

Homicide on re-
sistance of civil
Process.

June 29. & 30
1691.

¹ In one place he pleads, “That however the remedy mentioned in our statutes, of breaking the wand of peace, may have been thought suitable by the
“Legislature to that kind of deforcement that is carried on without invading
“the messenger with weapons offensive; yet it is not to be supposed that the
“meaning of the law would be beyond the expression of it, to preclude the Go-
“vernment and its ministers from the benefit of those remedies, which by the
“principles and practiques of all laws and nations of the world, is competent
“upon a violent invading of authority in the person of the messenger, who, as
“executor of the law, is the life of it.”

In another place thus: “That the authority of the Government being the
“only thing in danger by such an attack upon a messenger, the law warrants his
“resisting such opposition in manner alleged for him, albeit his own person were
“in no danger, otherways the power that the messenger is entrusted with would
“put him in no special case from the rest of the lieges; to whom, *de jure com-
“muni*, the allegiance of self-defence is always competent, albeit they have nei-
“ther Government nor authority to protect them.”

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“ Peoch their prisoner, by an execute caption, and that the
 “ defunct did by violence offer to rescue him, and did ac-
 “ tually draw a daiger upon William Fife, the pannel, in-
 “ vading him therewith, relevant to elide the libel *simpli-*
 “ *citer.*” It was found relevant to elide this defence, that
 the messenger killed the deceased at a time when he was
 rescuing his son-in-law from a mastiff, which had thrown
 him to the ground. It appeared in evidence, that Fife had
 severely wounded Wilson with a sword, on his first coming
 to the spot and showing a disposition to resist, and before
 his drawing of the dagger. His defence was found not
 proved, and he had sentence of death.

Homicide on re-
 sistance of civil
 Process.

THE next case is that of Simpson, and others, tried in July
 1757; which had a more fortunate issue for the pannels.
 The matter which gave occasion to the slaughter, was a
 warrant issued by the Justices of the Peace for East Lothian,
 to apprehend and bring before them one George Wood, a
 loose fellow, and a notorious poacher, with a view to his
 being sent off as a soldier, under authority of a statute
 of the time. The man was known to be of a hardy and
 desperate nature, and the constable took assistance of sol-
 diers to his house. Where, when they had arrived, and had
 notified their errand to him, posted as they were upon the
 steps and threshold, he answered by discharging a fowling-
 piece, loaded with ball, through the door. The soldiers
 now loaded their pieces at the constable's command, and
 standing aside from the door and the steps, they fired
 into the house; one of which shots taking an oblique di-
 rection, killed the man, standing in his shirt, upon the
 hearth, in his own apartment. The pannels farther prov-
 ed, that Wood had formed the resolution not to be ta-
 ken

ken alive, and kept several pieces ready loaded in the house. There was no special interlocutor of the Court upon the defence, (for before this time the practice had ceased of pronouncing any such); but the jury thought favourably of the case, and found a verdict for the pannels.

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A SPECIAL relevancy had been found in a former, and very similar case, that of the Master of Elphinston; where the party resister did indeed survive the injury, but received three wounds with a sword, of which he lingered for a time, in great danger of his life. The Master of Elphinston was an officer in the service of the King, and had accompanied a constable to the house of one Dick, to take him on a warrant from the Justices, as a proper person to be comprehended under the statute, for a soldier. The persons within refused admittance, and fired on the party from the house; whereupon the party broke in, and Dick was severely wounded. "The Lords find the libel against the Master of Elphinston as libelled, relevant to infer an arbitrary punishment; and sustained the defence proponed for the Master, that what he did was in assistance of the constable, to be aiding to him at that time in execution of his office, committed to him by the act 7^{mo} Annæ, anent recruiting his Majesty's forces, &c. or *separatim*, that what he did was in self-defence, relevant to elide the libel, and repelled the other defences and replies." The jury found the libel not proved, and the pannel was assolized.

Jan. 18. & 19.
1711.

Now it is to be observed of all these cases, that it is something more ample than the common plea of self-defence, that is sustained to absolve the pannels; neither does any of the interlocutors make use of that term, nor require the *periculum vitæ* to exculpate. To have the benefit of self-defence,

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the pannel must be able to say that he has retired from the invader, and avoided the assault, as far as with safety to himself he could; and that it was only out of necessity he killed, when he was otherwise in imminent and instant danger of his life. Now in no one of these cases is it alleged for the pannel that he at all yielded or gave back; and in any one of them, and more especially in the two last, where a locked door was between the hostile parties, he might at once have put his person in security, by abandoning the object of his warrant, on the threats and preparation of resistance. It is indeed evident, that to apply the common rule of self-defence in this department, and confine the officers of the law to the same narrow path as ordinary men, would put them in continual hazard of obstruction and deforcement, to the utter ruin of their authority and that of the law; till at last, (as I find it expressed in an old pleading¹), "every man's sword would become his own suspension, and the discharge of his debt." Even the firing at the officer, or an assault on him with mortal weapons, could not, upon that principle, justify him in the use of the like force, or in advancing to prosecute his purpose: For by the consent of all authorities, any such forward movement is subversive of the pure plea of self-defence. But an officer of the law, bearing the lawful warrant of a magistrate, has other considerations to attend to before the safety of the person who wrongfully opposes him; other duties to fulfil beside those of mere humanity; and must therefore have the benefit of quite a different presumption in his favour. If the party fly, he must follow; if he resist, far from yielding, he must stand to and maintain his service; and in doing otherwise,

¹ Case of Mackintosh in 1673.

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otherwise, he is guilty of a misdemeanour, tending to weaken the authority of the law, and unhinge the order of the State. If, therefore, he be reduced to the necessity of either killing the resister or abandoning his warrant, the law cannot in justice refuse to hold it for a slaughter done from constraint of his duty, and in nowise out of malice or resentment. Nor does it weigh against this view of the situation, that, in all instances of personal diligence, the slaughter, instead of fulfilling, defeats the object of the warrant. For that which the Judge chiefly considers in these questions, is not so much the carrying of the particular warrant into effect, as the vindicating of the authority of law, and of the magistrate, which would otherwise fall into contempt. And herein, as I conceive, lies one reason why, in England, the person who flies from execution of a civil process cannot be killed, though he who resists it lawfully may. His flight may be the most effectual disappointment of the warrant, even more so than his resistance: But in flying he does not dispute, he rather yields to and acknowledges, the authority of the mandate which is sent against him.

THE rule seems therefore to be, (and this, as I conceive, is the meaning of what Mackenzie¹ has said upon the subject), that in like manner as one may kill in defence of one's life, if one cannot otherwise save it; so an officer of the law may kill in defence of his office and his warrant, if necessary it be to the doing of his duty, and carrying his commission into effect. In judging however of this necessity, and of the kind and degree of resistance which shall be held to justify on such an occasion, the rule, as far as can be gathered from our records, and in itself a salutary and reasonable rule, appears to be, that none is held sufficient,

Homicide on
Resistance of
civil Process.

Q q

which

¹ Tit. Murder, No. 19.

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which does not carry evidence with it to the officer, that his life *shall come* to be in hazard, if he shall persist in the execution of his warrant. According to any light with which the practice of past times supplies us, the dread of a wrestling-bout or struggle, or even of a beating and bruising, in the prosecution of the service, shall not be held a relevant defence; nor indeed any thing short of the preparation of lethal weapons against the officer, or of such a power and force, as, in the whole circumstances of the case, plainly inform him, that but with the peril of his life he cannot *advance* to do his duty. The difference, therefore, between the case of the officer and of an ordinary man lies here. An individual, to justify his killing of the invader, must be in actual and instant danger of his own life *as at the moment of killing*, and so situated, that unless by sacrificing the invader, he has no means of escaping alive. But the officer shall be acquitted, if, at the time of killing, that danger be *in near and manifest preparation for him*, so as in reason to convince him that *he shall come to be in danger of his life*, in the farther prosecution of his duty, and although, by deserting the service, he might at once put an end to the hazard. A messenger, for instance, bearer of a caption, if, on coming to the house, he find a *posse* of the debtor's friends posted at the door with drawn swords, and resolute to oppose his entry, may justify the advancing and firing upon them, though no thrust have yet been made at him, and before coming within reach of their weapons; for his life and theirs are not, in these circumstances, of equal value to the law, nor is he obliged to expose himself so far on their account ¹.

5. ANOTHER

¹ Mackenzie (Tit. Murder, No. 19.) quotes the case of Macintosh and Fleming, as a decision on the power of messengers, when resisted without the use of arms.

5. ANOTHER article, which will require our attention, is the nature of a soldier's privilege, when opposed or assaulted in execution of his duty. Now, this may seem to be entitled to at least as liberal a construction as that of any officer of the law, on account of the nature of the man's employment; maintained as he is by the State, for the very purpose of repressing the disorderly, and being trained therein to contempt and resistance of all invasion, and moreover being himself liable in high pains for disobedience or

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Soldiers in their
Duty.

Q q 2

neglect

arms. But although that topic is discussed, along with others, in a very full debate, it does not seem to be decided by the interlocutor, which only finds that the libel was relevant, notwithstanding the *messenger's execution* bearing the pannel Fleming to have been a witness to the caption. The messenger was not himself under trial; and the allegation against the pannels was, that they, out of the presence of the messenger, and after he had gone off, without showing or attempting to execute the caption, assaulted and killed the person against whom the caption was, as also his brother, after the other had been slain. Farther, this was alleged to be done while these two persons were flying, and were pursued by six or seven.

Another case to which reference has often been made, is that of Archibald Beath, June 14. 1672. The Lords of Privy Council had issued a proclamation, authorising the lieges to hinder the importation of Irish victual, and to seize the same on any attempt to land it. A boat, loaded with Irish victual, had come to Lamlaish in Arran, where Mr Beath, a clergyman, and a number of other persons, armed, seized and took possession of it. Afterwards, in the absence of Beath, the crew recovered it from certain of the party with whom it was left in charge, and set sail to make their escape. Beath and his armed party in another boat pursued, and, on refusal to surrender, fired, and killed two of the crew. Now in this there was a plain precipitation and excess. It was the use of fire arms against a party who were not armed, and flying, and who are neither alleged nor proved to have offered any violence to Beath's party, but only to have threatened to run down his boat: Not to mention that it might well be doubted whether the proclamation meant to authorise a seizure by force of arms, or only *civiliter* by more orderly means. The Court repelled his defences, and the jury found him guilty, but the royal mercy interposed. The proof in the case is short, and only establishes the facts of shooting and killing, without any of the alleged circumstances, prior or concomitant.

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neglect of orders, and even for any common regard of his own safety in the execution of them. All which considerations, as they serve to separate the soldier from the mass of ordinary citizens, and to nourish a peculiar character in him, and a higher jealousy of disgrace or affront, (without which he were unfit for the duties of his profession); so do they in justice require a higher allowance of his forwardness in the maintaining of his service, whatsoever it is for the time, and are withal a warning to every one, not to molest or meddle with him therein.

THE precise boundaries of this allowance, I shall not attempt, (indeed I should be loath if I could), to define. This, however, in a general way, the judgments of the Court enable me to say, that an invasion with mortal weapons, or an actual and instant danger of death, is not necessary to entitle the soldier to use the arms which the State has given him; and therefore given him, that he and his duty may be secure, and in no danger of surprize, or material hindrance. In putting them into his hands, it is the intention of the State, and of the law, that in every case he shall keep them safe, and his person in condition to use them with effect; and that on any post or station which is assigned him, he shall maintain it surely, not only against actual capture of his arms, but against any considerable risk of such a misfortune. Which if he actually suffers by the loss of them, or if he shall quit his station without being relieved, he is liable to death by the mutiny-act, which is an annual statute, and part of the system of our law. Not only, therefore, the hostile invasion of his person with arms, but any violent attack upon him with other weapons, or any outrageous and alarming tumult raised against him, when at his post or in his duty, authorises him to be active in repelling it, and shall

shall indemnify him for any slaughter that ensues. Not HOMICIDE. that he can be justified (no one can be of this opinion) for mortally resenting a slight indignity, or for quelling every insignificant disturbance with force of arms; but this only, that being invaded in his duty, he shall be justified by a much lower violence and interference, than would be necessary to excuse another man. The following are among the cases, which may be mentioned in evidence of this exposition of the law.

On the 3d of August 1692, Captain John Wallace was indicted for the murder of three boys, and the wounding of several others, by ordering his company to fire upon a crowd of people in the street. The pannel answered, that he had orders from the Privy Council to keep guard with his company, at the Abbey of Holyroodhouse; that there had for some days been tumults in the city, and the rabble had threatened mischief to his guard, and to the building; and that at length, on the day libelled, they assembled in numbers, some of them with arms, and came down to his post, where (but without using mortal weapons) they beat his centinels; and that though warned they persisted to advance against his company; whereupon, to maintain his post, he gave orders to fire. The first part of this defence, relative to the conspiracy and threats of mischief, was found relevant to restrict the libel to an arbitrary pain, and the actual assault, to elide the charge *simpliciter*¹. The libel was found not proved,

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¹ Interlocutor: " And finds this defence, that on the Sabbath night, or shortly before, a rabble did meet in several places in great numbers, and that several of them did declare to John Paterfon, their resolution to trouble the pannel and his guaird, and to pillage the Abbay, relevant to restrict to an arbitra-

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proved, and the exculpation proved; and Captain Wallace was dismissed from the bar.

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Feb. 19. 1711.

IN this case there had been arms among the rabble; though it is not said that any use was made of them, before the order was given to fire. But in the case of William Hunt, dragoon, the invaders were not provided with any war-like weapons. This man was indicted for the murder of Henry Macmillan, committed on the street of Dalkeith, by a violent blow given him on the head with a clubbed musquet from behind; whereby the musquet was broken, and the man so hurt, that he died on the succeeding day. He pleaded, that the deceased was one of a rabble upon the street who had insulted, abused, and beaten down certain of the soldiers; and that on this occasion the guard, of which Hunt was one, being ordered to relieve them, and an attack being made on them with poles, clubs, shovels, and other the like hasty weapons, he killed Macmillan in the execution of this duty. In these terms the defence was found relevant to *assault*; and at the same time this other defence, that the slaughter was committed *in rixa*, of which the deceased was himself the author, was found only relevant to Hunt, as an ordinary individual, to restrict the libel to an arbitrary punishment.

“ry punishment; and finds, that the following defence, that the said rabble
“did, in a tumultuous manner, come down the Canongate with swords and fyre
“arms, and did beat some of the pannell's centinalls; and that being defyred to
“stand, they notwithstanding advanced so near, that the pannell could speak to
“them, and after he had defyred them to remove, or be at their hazard, they
“notwithstanding thereof, still persisted to advance, relevant to elide that part of
“the lybel *simpliciter*.” August 4. 1692.

punishment ¹. The jury found a special verdict, which did not establish that Hunt was the person who struck the deceased; and he was therefore acquitted.

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A THIRD, and no less apposite case, is that of John Willhouse, sergeant, Thomas Turner, Thomas Fraser, and John Muircock, private soldiers, indicted for the murder of Christian Greig and George Thomson, two of a multitude, upon whom they had fired. The case was thus. The pannels, along with one soldier more, had been called out for protection of a cargo of contraband spirits, which was already in the hands of the revenue-officer, who had impressed the King's mark upon the casks. While posted at the house where the casks lay, and in the absence (as far as appears) of the revenue-officer, the soldiers were assaulted by a mob of men and women, who with stones, clubs, and the like, broke in upon the party; and among other injuries beat down one of the soldiers to the ground with a plough-paddle, took possession of his musquet, and abused his person, while lying on the ground. In these circumstances the sergeant, without retiring into the house, gave orders to his party to fire; and two persons were killed. The Court found the defence relevant:

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Duty.
April 16.
June 15. & 16.
1730.

¹ " And find this defence, *viz.* That there being a tumult at Dalkeith, in which some of the dragoons were maltreated or trodden down, and the pannel being upon the guard under duty at the time, was commanded out for quelling the mob or tumult, and relieving the dragoons; and that the defunct having been in the rabble and tumult which attacked the party of the guard commanded out, or any of them, before the stroke was given, relevant to acquit the pannel *simpliciter*, and elide the libel; and *separatim*, found that the stroke being given *in rixa* or a tumult, where the defunct was author of the tumult or *rixam* himself, or that the stroke was given in defence of the pannel, or any of his fellow soldiers, when attacked, relevant to restrict the libel to an arbitrary punishment."

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relevant¹: The jury found the exculpation proved; and the pannels were affoizied.

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Soldier in his
Duty.

A MORE noted case than any of these, owing to the different opinion which was entertained of it in the supreme and inferior Courts, is that of Macadam and Long, a corporal and private soldier, tried in the Court of Admiralty, on the 25th September 1735, for the murder of Hugh Fraser, younger of Belnain. According to their defence, the occasion of the slaughter was as follows. They were quartered at Inverness, and were called by the revenue-officer, to go on board the customhouse boat, to assist him in his duty. They were ten men in all in the boat, of whom five were armed; and in the course of their expedition they came up with a boat, in which was Fraser and other ten persons more, with a cargo of smuggled goods on board; but excepting one, who had a pistol, all of them provided with cudgels only. Words ensued between the parties; and Fraser, followed by four more, one of them bearing a pistol, leaped into the customhouse boat, and invaded the officer and his assistants. The officer was knocked down, and his blunderbuss thrown into the sea; the soldiers arms were seized, and attempted to be wrested from them; and the men themselves, in the scuffle, were thrown down; in which situation

¹ "Lords find the said pannels, or any of them, having, time and place libelled, killed Christian Greig and George Thomson, or either of them, or their being art and part thereof, relevant to infer the pains of law; but *for eleiding thereof*, sustain this defence, that the said pannels were actually for some time in the possession or custody of certain goods seized by Daniel Macaula, who called them to his assistance, and were thereafter attacked by a mob throwing stones, and armed with other offensive weapons, and that some of the said mob did seize, disarm, or beat one of the soldiers, before the pannels did fire their shots, whereby the deceaseds were slain."

situation one or other of them thrust at Frazer with his bayonet, and killed him. On this narrative, a double plea was set up for the pannels: that they killed upon resistance in execution of their duty; at least that they killed in self-defence, being in danger of their lives. The Judge-Admiral sustained the plea of self-defence¹, and repelled the other; and the pannels were in consequence found guilty, and condemned to die; the jury being of opinion, "that the killing of the said Hugh Frazer was not in the necessary defence of their lives." Now, on review in the Court of Justiciary, this sentence was suspended, and for the reason announced in these words: "Fand, that the said Judge hath committed iniquity in restricting the defences proponed for the suspenders to the necessary defence of their lives, and repelling the other defences proponed for them; and therefore the said Lord Justice-Clerk and Lords Commissioners of Justiciary did suspend the interloquitor on the relevancy, verdict returned by the assize, and sentence of death pronounced by the said Judge, with all that had followed, or might follow thereon, *simpliciter*." On the 20th of the same month, in pursuance of their petition, and the Lord Advocate's consent, the pannels were discharged from custody, upon caution found to answer to any charge which might be brought against them. But they were not again indicted.

Dec. 5. 1735.

THERE are two precedents more, worthy to be observed; the case of Henry Hawkins, July 17. 24. 1769, and the case of Macfarlane and Firmin, February 4. 1788. Haw-

R r

kins

¹ " And sustains the defence of self-defence proponed by the pannels, that the killing of the said Hugh Frazer by the pannels, or either of them, was in the necessary defence of their lives; and repels the whole other defences proponed for the pannels."

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kins was on guard with his party, as corporal, at the guard-house of Glasgow, where a rabble attacked them with staves and stones, and after hurting several of the party, at length beat down and cut Hawkins; who therefore drew his bayonet and flew Hyndman, a butcher, the person who had beat him down. The jury found him not guilty; in which they had the approbation of the Court.

THERE was the like concurrence of opinion in the case of Macfarlane and Firmin, which was this. Macfarlane was an officer of excise, and had carried Firmin, a corporal of the 39th regiment of foot, and his party along with him, by water, to a village named Denoon in Ayrshire, there to seize certain unlicensed stills. This purpose they so far accomplished, as to deposit one still in their boat, under the care of one only of the boatmen, who had been left there in the charge of it. By this time the village was alarmed; and the inhabitants rising against them in numbers, as they were proceeding in their search, assailed them with stones, and compelled them to desert the service, and retire towards the beach. Meanwhile, one Kennedy, the man whose still had been seized, was at the boat before them; leaped into it, knocked down the boatman, and was proceeding, with all speed, to put off from shore. At this moment, Firmin, observing that the populace still continued to press them towards the water, and that in this way only they could retire in safety, took aim at Kennedy from some distance, and fired and killed him; and thus they made good their seizure and their retreat. At calling the libel against these panels, the Lord Advocate restricted it to a charge of culpable homicide only. But the jury were of opinion that the slaughter

ter was *inculpable*, and found a verdict of *not guilty* in favour of both the pannels.

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LAST of all, notice shall be taken of the case of Wood-west, a foldier of the 37th regiment of foot, tried at Glasgow, before the Lords Justice-Clerk and Henderland, in April 1792. This man was upon duty as centinel at the goal of Glasgow. A brawl had taken place upon the street, hard by his post, between certain striplings on the one part, and two foldiers and a woman on the other, who being molested, and pelted with stones, took refuge in a sort of entry or passage, behind his post. In this situation the rabble, many of whom were boys, but came to be mingled with grown men, continued to throw stones, and to threaten them with violence; they also insisted with the centinel either to turn out the foldiers and the woman from their place of refuge, or to let the populace come upon his post, and pass his centry-box, and execute their will on the objects of their displeasure. The centinel refused to do either; and then they began to annoy him in the same fashion with stones and mud; abusing him likewise with foul names, and pressing close in upon his post. He, in return, advised them to keep off, and warned them that he should be obliged to fire, if they persisted. The throwing of stones continued however for some minutes, notwithstanding that, in the course of this time, he endeavoured to deter them, by making preparation, as if to charge them with his arms. At last, when many of the rabble had pressed so close upon him as to be within a musquet's length, he made ready, and, after waiting a moment, fired. The shot took place and killed a boy. It appeared upon the trial, that though several stones had hit his arms, the man himself had never been struck, nor

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his person in any degree been injured. But on the other hand, it was given in evidence, that it was part of the orders of every centinel to keep his post clear, and his person free of all risk of surprise, or of seizure of his arms; as also to quell every manner of disturbance raised against him on his post, and to protect any person, who should take refuge there in a situation of distress. The Judges were agreed, that though the term might not appear in our proceedings, yet the thing itself of justifiable homicide was well known in the law of Scotland; and that the case of a centinel who kills in defence of his post, where he is unlawfully and without provocation assaulted, and which he cannot leave without orders, is a case of that description. The pannel had a verdict of *not guilty*, and was dismissed *simpliciter* from the bar.

Case of Captain
Porteous.

IN answer to these numerous and uniform precedents, reference may perhaps be made to the noted case of Captain Porteous, tried on the 19th July 1736. The general outline of this case is well known. That he, being Captain of the city guard of Edinburgh, and having in that capacity to attend the execution of one Wilson a smuggler, who was favoured by the people; and a tumult being raised after the man had hung on the gibbet for some time, with the view, as was supposed, of cutting down the body and taking possession of it, in order to use means for its revival; and in the course of this attempt the city guard being assaulted with stones; he, Porteous, gave orders to his men to fire, and also fired himself among the people; whereby seventeen persons were killed or wounded. The jury found a special verdict in these words: "Find it proven, that the said John " Porteous, pannel, fired a gun among the people assembled at " the place of execution, and time libelled. As also, that he " gave

“ gave orders to the foldiers under his command to fire,
 “ and upon his and their fo firing, the perfons mentioned in
 “ the indictment were killed and wounded. And find it
 “ proven, that the pannel and his guard were attacked and
 “ beat by feveral ftones of a confiderable bignefs thrown
 “ amongft them by the multitude; whereby feveral of the
 “ foldiers were bruifed and wounded.” Upon this verdict
 Porteous had fentence of death. On application to the
 Crown, execution was ordered to be refpited; and it was
 believed that this order might probably be the fore-runner
 of a pardon. But fuch was the rage excited among the
 populace by the profpect of his efcaping the punifhment
 which they thought due to his crime, that joining in a vaft,
 yet well concerted tumult, they for the time made them-
 felves mafters of the city; and having broken into the goal,
 conveyed their victim from thence to the common place of
 execution, where they facrificed him to their revenge, with
 many circumftances of outrage and cruelty.

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BUT between the cafe of Porteous, and any of the pre-
 cedents which have been cited on the other fide, there is
 this material circumftance of diftinction; that the afsembly
 on which the flaughter was committed, was not an illegal
 and criminal, but a lawful, and (as it muft be efteemed)
 even laudable afsembly, in which by far the greater part of
 the perfons prefent were innocently and properly met, and
 neither in truth were, nor could in law be held, participant
 of the evil purpofes of thofe among them, who came there
 with intent to refcue the convict. Now to *juftify* the firing
 upon a multitude of this defcription, would have required
 higher provocation than that which is mentioned in the ver-
 dict, and far more favourable circumftances of delay, warning,
 and

Cafe of Captain
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and forbearance, than were necessary in any of the other cases, or than this unfortunate pannel could allege. The tumult had not been of long continuance, at the time when he gave order to fire; and this he did without authority from the magistrates of the place, who were at hand to be consulted on the occasion. Neither does it appear that he ever warned the people to desist, or gave notice of his intention to fire, or allowed time for the peaceable and well disposed to withdraw themselves from the danger. The fire too was not directed to that quarter only, from which the stones were thrown; and stepping out of his proper duty, Porteous acted the part of a private soldier, and was himself the first to discharge his piece. Certainly, in these circumstances his conduct could not be fully *justified*. Whether his offence might not properly have been referred to some of the lower species of homicide, if the jury, in their verdict, had stated all those favourable circumstances for the pannel which the proof warranted¹; nay whether there was not even room for this construction upon the verdict as returned; and whether, upon the whole case, there might not be just cause for interposition of the royal mercy, to mitigate the

¹ It was *admitted* on the part of the Crown, that the magistrates, in the fear of a rescue, had given orders to the guard to load, before proceeding to take charge of the convict; and that a body of the King's forces had been called into the city, and assurance given them of permission to fire, if they were attacked. Farther, it seems to be *proved*, that before the order to fire, the convict's body was actually cut down by the mob; that the guard were pressed upon and thrown into disorder; that the executioner was cut in the face with a stone, to the effusion of his blood; that a drummer was cut in the head to the effusion of his blood, and his drum beaten to pieces in the same way; that a soldier of the guard had his shoulder-blade broken; and that the pannel himself was struck with a stone, before he fired. The verdict does not state any of these things, and the Court could not consider them. But even upon what is found by the verdict, it has not to every person seemed clear, that the case fell to be construed a case of murder.

the sentence, are different questions; and perhaps are not so clear against the sufferer as one would wish them to have been.

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PERHAPS, reference may also be made to the case of Samuel Mathews, tried in August and September 1721, for the murder of Thomas Boyd. Mathews was one of a sergeant's party of twelve, who had orders to patrol the streets of Edinburgh, on account of tumults, which were apprehended at the time. At the port of the city, called the Netherbow, and in a lane adjacent, (Leith-wynd), the party had met with abuse of words and other annoyance: It was even alleged, (but the proof of this entirely failed), that a shot was fired at them from among a rabble within the gate and city-wall. In return, Mathews and other two fired without orders, and Thomas Boyd was killed. His defences were repelled, and the jury found him guilty; but sentence was prevented by a pardon. That which seems chiefly to have weighed in this case, was the circumstance of firing without orders from the commanding officer, and indeed against his injunction. For it was stated, and appears to have been true, that when certain of the men levelled, the sergeant struck up their pieces, and led off the party into another street, (the Canongate); upon which Mathews and two more broke their rank, and turning towards the port, directed their fire that way.

Case of Samuel Mathews.

YET, though it may be generally, it is not without exception true, that a soldier can only be justified for that slaughter, which he does upon the order of his superior officer; for it may happen him to be beaten down, and to be in instant danger of losing his arms, before his officer can interpose, either to assist or direct him. In like manner, it is

Case of Soldier acting without Orders.

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is generally true that an officer and his party, called to assist the civil magistrate in the quelling of a tumult, must wait his orders to act against the rioters, and shall not be excused, how great soever the commotion, if they proceed without that authority. Yet, if beside persisting in the original purpose of mischief, (as to which, until the magistrate authorise them, the soldiers are but as so many individuals), the offenders shall proceed to assault, and outrageously to abuse the soldiers themselves, so as to put them in plain hazard of being driven from their post, or of losing their arms, or being disabled for the service; certainly, as men and as soldiers, they have right to defend themselves from these injuries, without leave of the magistrate, who is blameable that he does not permit them. Being brought thither at his instance, the whole party are here in the same situation as a centinel, and cannot retire until he dismiss them; neither, any more than the centinel, are they to remain there, to be made prisoners, or to be maimed and disabled. In case of attack made on them on any other occasion, and when under command of their own officers only, this would be their undoubted right; and certainly it is not the less so, that they are here attending in aid of the magistrate, who owes protection to them equally as to the rest of his Majesty's subjects, and the more to them, as they have been brought by his act into this situation of danger. It is to be observed, that neither in the case of Willhouse, nor of Macadam and Long, was there any order on the part of the revenue-officer, to repel the attack by force.

Homicide by
Revenue-offi-
cers.

6. THE officers of revenue form another class of persons, whose situation, for reasons of the same kind as that of the officers of justice, demands allowance of peculiar powers towards the deterring and overcoming of that resistance,

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authorises

Gilbert White, indicted for murder, July 2. 29. 1776, pleaded, that he was resisted and assaulted in an attempt to seize run goods. The interlocutor was in the ordinary general style. The verdict was *not proven*. It appears from the depositions in the record, that the pannel and another, armed with swords, were opposed to four smugglers, some of them bearing staves, and that White was beaten, and also cut in the hand, in attempting to make the seizure.

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authorises the officers of customs or excise, and their assistants, when resisted in the searching for or seizing of goods, by persons who are passing with the same, armed with offensive weapons, "to oppose force to force, and to endeavour by the same methods that are violently used against them, and by which their lives are endangered, to defend themselves, and execute the duty of their office:" In doing which, if any person shall be killed, and the officer or his assistant shall be prosecuted, he may plead the benefit of the statute. In truth, this direction is nothing more than declaratory of the powers which arise to the officer *vi juris*, (and on the same principle as already explained in the case of the officers of justice), from the command of the law to him to make the seizure. For if the smuggler oppose him therein with mortal or offensive weapons, whereby the officer *shall come* to be in danger of his life, if, as by the law encouraged, and in duty bound, he shall *advance* and persist to make his seizure; he must needs have right to quell this rebellion by employment of the necessary means, and cannot be answerable for any mischief that ensues. This statute is virtually confirmed by a later one, that of the 24th Geo. III. c. 47. which has made it punishable with death, to wound, or even to shoot at, any officer of the navy, customs, or excise, (or his assistants), acting in the execution of his duty. It follows, that the officer, in such a case, who has thus a capital felony committed against his person, has right to persist, at the utmost peril of the criminal, in the prosecution of his lawful object.

Homicide by
Revenue-offi-
cers.

BESIDE these, which are cases of resistance by persons who are in the act of smuggling, there are many other situations

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tuations of interference between the revenue-officer and the lieges, with respect to which it would much exceed the compass of our enquiry, if we should attempt to settle, How far he can be justified in the use of force, upon the resistance or refusal of what the law entitles him to demand. But in general, it seems to be true of those numerous entries and visitations, which the Excise laws have ordered in regard to certain manufactures, and the sale of certain articles, and whereof the refusal exposes to very high pecuniary penalties, that the Legislature has not meant to authorise the use of force, and has made the penalties so high, for the very purpose of hindering any recourse to it, and of outweighing any possible profit which the dealer can have by his disobedience to the law. It is also to be remembered, that the offenders in this way, are not, like smugglers, needy and desperate persons, or strangers, who must be quelled upon the spot, but persons domiciliated in the country, and possessed of effects here, which, as well as their persons, are accessible to the law, for punishment of their trespasses.

III. I SHALL not enlarge farther on this part of our subject; of which sufficient has now been said, to give a general notion of the principles by which it is governed. But it is necessary to examine that sort of homicide also, which is justifiable upon necessity of a private nature, or out of duty to one's self. The most indisputable instance of this class, is slaughter committed in the necessary defence of one's own life, against an attempt feloniously to take it away. I say against a felonious attempt to murder; for I am not at present speaking of that self-defence, which may become necessary in the course of an affray, or occasional quarrel, between persons who have fallen out upon the spot, and, in the

Homicide in defence of Life against a Felon.

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beginning, are probably, both of them, more or less in fault. Those two kinds of self-defence are not grounded in the precise same reasons, nor subject in all respects to the same construction; nor indeed are they attended, in every instance, with the same benefit of an absolute and entire justification. One difference between them is, that to enjoy the plea of self-defence, as upon an occasional quarrel, the survivor must have given back, and done all that in him lay, to take himself out of the affray, without shedding the blood of his antagonist. But it were unreasonable to exact the same temperance and *moderamen tutelæ* of him, who being on the high-way, and alone, is suddenly thrust at from behind by an assassin, or has a pistol fired in his face, by one who springs out upon him from the side of the way, with intent to murder. There is in such a case no manner of possible or imputable wrong on the part of the person assailed, for which he should make amends by retreating: In duty to himself, he is rather called on, instantly, and without shrinking, to stand on his defence, that the assailant may not continue to have the advantage of him, but be terrified from the farther prosecution of his felonious purpose. To what greater lengths he may carry the attempt, or what other means he may have prepared to accomplish his end, a person invaded in this sudden manner cannot know, nor is obliged to consider in such a moment. He is entitled to suppose the worst of that which has been begun in so base a fashion; and, by the law of nature, has therefore right to put himself in security by the only certain means, the instant slaughter of the assailant; who is no true man, that his innocent victim should contend with him on equal terms, but a great criminal, taken in the commission of a known felony,

felony, and the fit object, therefore, of immediate and summary justice.

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It seems also to be true, that the right of slaughter on such occasions is not confined to the person himself who is attacked, but is common to him, (which never can be true of self-defence upon a quarrel), with his friends or servants, or others who are along with him. Nay, it may even be maintained, that though the assailant give back on the resistance, yet the innocent party is not for this obliged immediately to desist, (since it may be only a feigned retreat, in order to call associates, or to renew the assault with better advantage), but may pursue and use his weapons, until he be completely out of danger.

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HAVING accomplished this object, how far he has right still to pursue the offender onward, for the purpose of taking him and bringing him to justice, and to kill him if he will not be taken, is a question which seems to hinge upon this other. What powers has an officer of the law for the same purpose? For whatsoever powers the officer hath by reason of his station, the same hath the party in this case by reason of his certain knowledge of the offender, and the present opportunity of bringing him to justice. In general, it is obvious, that all the powers which he possesses, belong to him for the ends of justice only, and in nowise for those of resentment or revenge. So that if he kill the criminal after he is secured, or after he is reduced to such difficulties that he cannot escape, or may probably be taken alive, it is at least a culpable homicide; and if there has been any interval for reflection, it may even amount to murder. For it matters not how vile or mean the person slain, if he is killed out of deliberate cruelty, or revenge. These observations I only

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only offer as my own sentiments ; which are not indeed contradicted by any thing in our practice, but have not the authority of any judgment of a court of law. Indeed, I cannot find, that any proper case has ever happened for the illustration of this sort of self-defence. And the other is so much a more frequent situation in practice, that the lawyers not of this only, but other countries, have chiefly directed their attention to it, and have formed their general precepts respecting the duty of self-defence, with a view to it alone.

Homicide in
hinderance of
Rape.

IN like manner, as a man may kill in resistance of an attempt on his life, a woman also hath right to kill in resistance of that injury to her honour, which cannot be repaired if it be committed, and of which she is entitled to feel the highest resentment. By parity of reason, the husband or the father of a woman thus invaded, has right to feel the like resentment, and to defend her from this extreme and cruel injury, at the hazard of the invader.

Homicide in de-
fence of Pro-
perty.

THE right of resistance unto death is not however limited to cases of attempt upon one's person, but equally applies to invasion of one's property, if it be made in that forcible and felonious manner, which naturally carries fear along with it. I say in a manner which is at once forcible and felonious ; for I conceive that the right fails, if either of these circumstances be wanting. It may be a high, and even a capital crime, to pick a person's pocket of large sums of money, or to steal his linen to a great value from the hedge. But he certainly shall not be justified, if instead of seizing he instantly stab the pick-pocket, on discovering what he is about, or if he shoot the thief from behind the hedge, before he know that he is detected.

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As little will the force be sufficient, if it is not of a criminal or felonious nature, but a trespass only, or other low offence. A few instances will illustrate this matter. It will not be lawful for me to kill my neighbour, who persists to search for game upon my lands without my leave; or who, on a mistake of our marches, shall poind and carry off my cattle pasturing on my grounds, in the belief, though grossly wrong, that the grounds are his. Or what if he come at the head of his servants and people, to throw down a dike or other bulwark within my property, or to throw open an alleged common, about which there is a controversy between us? In any of these cases, since the trespass on the property is not coupled to an assault on the person, (for if it were otherwise the question would be far more delicate), it is grounded in the highest justice, that the blood of the assailant cannot be shed, to prevent the injury. For neither is there the same depravity on his part, nor the same trepidation and alarm in the person assaulted; as well as there is no cause to believe that the trespasser will fly from justice, on account of such a fault, or that full amends may not be had in course of law. But it is quite otherwise if I am attacked on the high-way, under night, and in a solitary place, to be robbed. This injury can only be accomplished by subduing my person, and I have reason to dread all sort of violence on refusal, or even delay to comply; nor am I even sure to be exempt from it, though I deliver: besides that, if once surrendered, my property is lost, with but little chance of recovery at any after time. Meeting in this manner, the assailant and I are therefore in a state of open warfare, in which I have no terms to keep with him, and am under no obligation in law, whatever compassion may suggest, to consult his safety, but may prevent and chastise his felony upon the spot.

HOMICIDE.

Homicide in defence of Property.

ACCORDING

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Killing of a
House-breaker.

ACCORDING to all authorities, that of the Mosaic and the civil law, as well as our own custom¹, and indeed according to the express permission of the statute, 1661, c. 22. one is also justified in killing him who breaks into one's house in the night, to steal. But though this be the example given in these authorities, it would not be reasonable to understand them in a restricted sense, such as would limit the privilege to the case of an attempt to steal only; but rather as grounds, *a fortiori*, for authorising the same course of resistance of him, who breaks into the house to commit murder, or rape, or haimesucken, or to set the house on fire. Nor is it even necessary that the felon have carried his assault so far, as clearly to show which of these several felonies was in his purpose; if either he has entered the house, or has broke the safeguard of the building, so that he may enter when he will, and is in the act, or immediate preparation, so to do. Because this is an assault of so bold and deliberate a nature, and in which the invader has already so much the advantage, as warrants those within to dread the worst designs, and such as are not to be prevented but by superior force; as well as that all they can do upon this sudden alarm is no more than sufficient to put them on an equal footing with the felon, who comes cool and prepared for the enterprise. Tenderneſs for the life of another may indeed suggest to make trial, by cries and otherwise, to deter him from his purpose, before proceeding to the use of higher means. But how commendable soever this generosity in those who have sufficient presence of mind to employ it; still it is what the law cannot absolutely enjoin, or hold a person

¹ See Exodus, c. 22. v. 2. & 3.; 1. 9. dig. ad leg. Corn de ficariis; Stat. 2da. Ro. I. c. 30.

person to be culpable for omitting. The main consideration in all such cases is the alarm, surprise, and danger of the true man, who at the hour of rest, and in his place of surest refuge, finds his safeguard broken on a sudden, and his person within the power of a felon, who has thus a favourable opportunity to accomplish his purpose, and escape unknown. In these circumstances, he may always be said to be within the protection of that text of the Roman law, which allows the killing of the nightly thief, "*si parcere ei sine suo periculo non potest*;" for there is always hazard, more or less to the inhabitant of the house, from an assault which has already been carried this length with success.

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IN regard, again, to those cases, where the strength and safeguard of the building are still unbroken; it may rather be esteemed the duty of the inhabitant, being himself in safety at the time, to use all natural and gentler means for scaring the invaders from the prosecution of their purpose. And certainly he shall not be free of blame, (some have thought that it may even amount to murder), if, instead of following this course, he purposely keep quiet for a time, and deliberately take aim at the thieves, standing without, and kill them; or if he knowingly suffer them to enter the house, and post himself in a safe and convenient station, from which he kills. For in this course of conduct he rather shows a desire of the blood of the individual, than to prevent his own injury or danger. But it will deserve a very different construction, if, instead of taking flight upon alarm raised within the house, and means used to scare them, the invaders shall despise these warnings, and openly persist in their purpose to force an entry. This would even be the most favourable of all situations

Killing of a
House-breaker.

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ations

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ations to those within, who are thus assured of the most violent intentions, if entrance shall be obtained; and must therefore defend themselves, by any the most effectual means, so long as they have it in their power.

Killing of *Fur diurnus*.

IN the case of one who steals in the day-time, there are plain and substantial reasons, why more caution should be observed. It was accordingly the precept of the Mosaic law, "If the sun be risen upon him, there shall blood be shed for him." The law, also, of the Romans, seems only to have permitted the killing of the *fur diurnus* "*si telo se defenderit*." And in our statute 1661, c. 22. there is no special excuse set down, but of homicide committed upon thieves and robbers, breaking houses in the night. These authorities are however rather to be received, as applicable only to the ordinary case of invasion of one's property in the day-time; which being that the danger may be warded off without recourse to those ultimate means, they are therefore forbidden to be used. But in this, as in every other enquiry in criminal matters, consideration must always be had of all the circumstances of the situation. And that a person who is assaulted in the open air, to be robbed, or whose house is feloniously attacked, in order to be rifled or burned, or to commit a haimesucken on him;—that he is obliged in any case, or at any hour, rather to suffer this great wrong, which the law punishes with death, than to hinder it, if it can no otherwise be done, by killing the invader; or that law has received any presumption so contrary to the truth, as that this cannot be necessary against an attack in the day-time; any of these things, it is neither reasonable in itself, nor agreeable to the analogy of the rest of our practice, to believe. In solitary and remote situations, where there is little
use

use of passage, or likelihood of relief, there may be no other means of defending one's property. And if this were not itself a sufficient reason; how is the owner to know that the ruffian who assails in this open fashion will be content with his effects, and not endeavour, as in the day-time he is strongly tempted, to take his life too, that he may not prosecute, or bear evidence against him? HOMICIDE.

Though they are not so probable, yet cases may even be imagined, to justify the slaughter of the felon, though the first abstraction was of a secret and proper theftuous nature. Put the case, that a person on foot, and at a distance from any habitation or resort of passage, meets a thief riding off in all haste upon his horse, which he has stolen from the field. If he call to him to stop, and instead of complying, if the thief continue the more hastily to ride away, whereby he will soon be out of the reach of the owner's pursuit, or of any hue and cry that he can raise against him, there seems to be no law which should hinder him to save his property in this necessity, though at the expence of the felon's life. "*Unde sequitur,*" says Grotius, "*si ad jus solum respicimus, posse furem, cum re fugientem, si aliter res recuperari nequeat, jaculo prostrari; nam quæ inter rem et vitam est inequalitas illa, favore innocentis, et raptoris odio compensatur* ¹." It is not a sound argument, that is drawn to the contrary from the provisions of our statute, 1662, c. 6. which directs a certain course for the pursuit of thieves and depredators, by application to the nearest magistrate, and raising the *posse* of the parish, and declares the killers free of challenge, if in this pursuit any of the thieves be slain. For this whole ordinance relates to the situation "after the away-taking of the goods," and

Killing of *Fur diurnus*.

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cannot

¹ Lib. 2. c. 1. No. 11.

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cannot be construed as in derogation from any power which arises to the owner at common law, for maintaining himself in the possession.

Homicide in
Self-defence.

IV. HITHERTO of homicide committed in defence against any attempt to perpetrate *a felony* on goods or person. But the more ordinary situation of self-defence, is that where the motive of the invasion is not so foul, nor so deliberate, but lies in some misbehaviour of one or other of the parties, some offence of word or deed, real or conceived, which has kindled anger on the spot, and led to the mortal strife.

Now, with respect to all slaughter committed on such occasions, it is the doctrine of the law of England, grounded in its tenderness of the life of man, that it will not hold the survivor entirely guiltless, but will rather presume that, which it cannot always investigate, but which must often be agreeable to the truth, namely, that the survivor was in some measure to blame, and in a greater or less degree brought the assault on himself. On conviction, therefore, of slaughter *se defendendo*, the prisoner is not simply acquitted, but has sentence of forfeiture of moveables, against which he has a pardon, and writ of restitution of his goods, as a matter of course and right.

Blackstone,
vol. iv. p. 187.
188.

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Self-defence.

Our practice again, in this more lenient, but I shall not say wiser than that of England, has not received any such invariable presumption against the survivor, but investigates the fact in each case as it happens; and in judging of the pannel's plea, requires such a course of conduct to his entire acquittal, as bears earnest of his peaceable disposition, and sincere aversion to shed the blood of his fellow-creature. That is to say, in all cases where it appears that either in the origin

origin or the progress of the quarrel, or in the ultimate strife, there was any thing faulty or excessive on the part of the survivor; there, for the sake of correction and example, the Judge will inflict a suitable punishment on him, though it be true that he killed out of no wickedness or malice, but only to save his own life, and in the genuine belief that he could not otherwise escape. This last part of the rule, beside that it is grounded in reason and uniform custom, is declared by the statute 1661, c. 22. which in the case, among others, "of homicide in lawful defence," protects the slayer against the capital pain, but declares it lawful to imprison him, or to inflict a fine on him, to the use of the relict or children of the deceased.

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THE general description of slaughter in self-defence, is, that it is committed from necessity; in the just apprehension, on the part of the slayer, that his own life cannot otherwise be saved, and without alloy of any other less excusable motive. But this description will require to be particularly analyzed.

I. AND first the pannel must have killed, *to save his life*. For it will not bring him within the benefit of this plea, however the case may be as to others, that he killed to avoid some great indignity, or even some bodily harm; if it be clear that this and no more was what he had reason to fear. If, for instance, he kill to avoid being kicked down stairs, or upon attempt to horsewhip him, or roll him in the kennel, he cannot be fully justified: because, how painful soever such injuries to the feelings both of mind and body, they still are not mortal operations, nor attended with any immediate danger of death; so that they amount only to a plea of great provocation, which will not in any case completely exculpate.

Killer must be
in Danger of
his Life.

Thus,

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July 24. 1690.

Thus, in the case of John Macmillan, sentence of death was given upon a verdict, which implies that the pannel had received repeated strokes of a staff or baton ¹.

Feb. 23. and
Mar. 1. 1710.

IN the case also of Peter Maclean, a soldier, indicted for the murder of John Ewan, by firing his carabine at him, it was found only relevant to restrict to an arbitrary pain, that he had been abused with foul names, her Majesty reviled in his presence, and his own person assaulted, to deprive him of his piece ². The case of Ensign Hardie is a third illustration. This pannel had pleaded self-defence on these grounds; that the deceased was the aggressor, had stopped his horse by the bridle, and had struck the pannel on the face with a rung or tree, to the effusion of his blood, and brought him to the ground from his horse. But all these injuries, pleaded as amounting to self-defence, were expressly repelled; though as a great provocation, they were, by

June 9. 1701.

¹ "The jury find the defunct Thomas Grierfon of Bargaltown, was killed by the pannell's sword, in the pannell's own hand; and find that defence of the pannell's, that the defunct run himself upon the pannell's sword, not proven; and likewise, find the stick deponed upon, not such a baton or staff as might brain or kill the pannell, *especially seeing all the strokes the defunct gave the pannell therewith*, did not so much as draw blood of the pannell." Sentence of death was given, August 21. 1690.

² "The Lords find the indytmnt relevant to inferr the pains of death; and sustained the defence proponed for the pannell in these terms, *viz.* That the defunct quarrelled the pannell under the name of rascall, how he durst carry a fowling-piece, and that if the Prince had his own he durst not do so; and adding these words, that her Majesty was but a whore, and thereupon assaulted the pannell for taking his carabine from him, relevant to restrict the lybel to an arbitrary punishment."

by a later interlocutor, sustained to restrict the libel to an HOMICIDE. arbitrary punishment ¹.

As appears from this case of Hardie, it will not even be sufficient that the injury is of that kind, which by long continuance may come to kill, or do a mischief from which death may ensue. The assault must already have continued so long at the time of killing, and have been conducted in such a manner, as puts the sufferer in imminent and present danger of his life, and shews the assailant's purpose, not to be satisfied with less than his destruction. One, for instance, who is carried to the river and ducked, may by this abuse contract a fever, which may prove mortal; or the operation may be so often repeated, or so unmercifully conducted, as to destroy the person on the spot. Yet neither of these hazards will justify him in repelling the outrage with death in the beginning. In like manner, a school-boy may die of the consequences of excessive correction; or he may be so cruelly scourged as to expire under the master's hands. Yet if he draw a knife and stab the master on the first excess, were it even a great excess, he shall certainly be liable to punishment; or it may be that he is even guilty of murder.

Killer must be
in Danger of
his Life.

¹ 1st Interlocutor. "The Lords find the indytment relevant to infer the pains lybelled, and repell both the declinatory and peremptory defences, as proponed for the pannell."

2^d Interlocutor, given June 16. 1701, after an additional debate. "The Lords sustain these defences proponed for the pannell, viz. That the defunct was the first aggressor, and did take hold of the pannell's horse-bridle, and when he was holding the horse by the bridle, did give the pannell a stroak over the face with a rung or tree, and wounded him to the effusion of his blood, and that the defunct beat the pannell from his horse *conjunctim*, relevant to restrict the lybel to an arbitrary punishment."

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Jan. 19. & 26.
1730.

murder. Matters, in short, must have come to the situation *morti proximum*, in which the sufferer has a reasonable and instant dread of death, before he can justifiably shed the blood of the aggressor, to put an end to the assault. In this view it probably was, that in the interlocutor upon the case of David Pretis, the Court made use of very special terms, and such as are exclusive of any lower danger than has now been described. He pleaded, that the deceased had assaulted him in his own house; had dragged him from thence, cut him in the head with some sharp instrument, and beaten him to the ground. But instead of adopting these allegations, the Court had thought it safer to find in general thus: “ But for eliding the foresaid relevancy, sustain this defence to the pannel, *viz.* that his wounding of the defunct was in self-defence, while the pannel was by the defunct’s invading of him put under the imminent hazard of his life.

False Opinion of
Danger not sufficient.

It is not sufficient that the pannel have killed out of apprehension, though in him ever so genuine, of danger to his life, if it was not also a reasonable apprehension, and well grounded in the circumstances of the situation. In a matter of this kind, the law cannot entirely pardon any vain terror or sudden panic; for against this, so far at least as concerns his conduct towards others, it is the duty of every man to be on his guard. Neither can it have consideration to that extent, of an excessive timidity of temper, (which is a blameable habit and ought to be corrected), nor of any gross misapprehension of the nature of the assault; because it will always be supposed that by due caution and attention such misfortunes may be avoided. If therefore one kill a person who makes an attack upon one in sport with a foil; or if one mistake some harmless

harmless instrument for a pistol presented at one's head, and kill the supposed robber or assassin, some censure must necessarily follow. Allowance there may be for such unfortunate mistakes, since the deceased himself cannot be acquitted of indiscretion, in that he made this feigned assault; but it cannot go the length of justifying the slaughter, which is not done on any real danger of the pannel's life, but on a false and hasty opinion only to that effect.

HOMICIDE.

THIS position is in some measure illustrated by the case of Captain John Price and others, indicted for the murder of John Reid corporal of the town-guard of Glasgow. Their defence was thus: that being in a tavern, they were abused by the people of the house, and were afterwards assaulted by a multitude, who gathered in front of the tavern, and attempted violently to break in on them; which obliged them to barricade the doors, and have recourse to arms. In the mean time the guard arriving, and making open the doors, if any of them was shot by the pannells, this (they said) was done ignorantly, and in the belief, excusable in such a state of trepidation and disorder, that the guard were part of the mob, continuing their assault on the house. These allegations were found only relevant to restrict the libel to an arbitrary punishment ¹.

False Opinion of
Danger not suf-
ficient.
Nov. 24. 1690.

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¹ November 26. 1690. " The Lords find the lybel, anent the slaughter of
" the deceased John Reid, and the pannells their being art and part thereof, by
" each of them their striking at the guard, resisting or opposing them, or having
" drawn swords or pistols in their hands, relevant to infer the pain of death; as
" also that defence, that the pannells were assaulted by the rable, who cryed
" fire upon the dogs, or the like expressions, before audible intimation was made
" that the guard was come up, relevant to restrict the lybel, anent the slaughter,
" to an arbitrary punishment; but they find the duply, that the pannells were
" advertised of the guard's being at the door, and required to open to them, so as
" they might hear the same, relevant to elide the said defence *simpliciter*."

CHAP. VI.

Fear of Death
must be at time
of killing.

IT is equally obvious, that the apprehension of death must apply to the very time when the slaughter is committed. It will not bear out the plea, that in the beginning the survivor is taken at a disadvantage, and at one period of the contest is "*in periculo constitutus*," if he has ceased to be so before the fatal blow is given. John suddenly draws, and pushes at James, who draws in his defence, but gives back without thrusting, till he is forced against a wall, where he must either fight or die. If in this situation he kill, it is self-defence. But if at this moment John, making a thrust at James, happens to fall, and the sword flies out of his hand in the fall, and is broken; or if James, at this time, by a lucky hit disarms John, whose sword is tossed to a distance; and if instead of using this opportunity to escape, or to make himself master of John's sword, James shall follow up the accident with repeated thrusts at John, thus disarmed, and kill him; he has at least lost his pretensions to the plea of self-defence, however the case may stand as to any other. Or suppose that James, being put to the wall, has thrust and wounded: if upon this John retires, and James advances on him; and John retires still farther, and James continues to advance thrusting at him, and at last kills; here also he cannot be justified. The case of Edward Davies, as it turned out on proof, seems to have been of this description; though I cannot for certain affirm whether it was judged on this or on another ground. Davies, a soldier, was charged with the slaughter of Robert Park, a countryman, by running him through the body with a sword, from back to breast. He pleaded, that the deceased, and three more, provided with staves, had attacked and beaten him in the street; that he retired, and they pressed on him, and cut him severely in the hand; whereupon he called for the assistance

Dec. 8. & 18.
1712.
Jan. 1713.

HOMICIDE.

stance of the guard, which was near at hand, and drew and made use of his sword. The reply was to this effect: that any danger he had ever been in was past, since the guard were coming up to his relief, and the aggressors were retiring at the time; and that in particular this was the case with the deceased, as appeared from his being wounded by the pannel in the back. Either on this footing, or on that of high provocation, and that the pannel had never been truly in danger of his life, the defence was found only relevant to restrict the libel to an arbitrary punishment¹.

2. THE self-defence must not only be genuine in this sense, that the killer is assaulted to the danger of his life, but it must be just and *necessary* also; the one refuge which the killer has from this high peril of his person. That is to say, the plea will not be good in those, not unfrequent situations, where the pannel has other ways of escape from the assault, or the certain and easy means of putting an end to it, but out of pride, or humour, or some false notion of dishonour in the thing, chooses rather to stand and repel the violence, than have recourse to them. One for instance, who is assaulted at mid-day, on the street, where he may easily re-

Not Self defence, if Killer can escape otherwise.

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tire,

¹ December 18. 1712. "The Lords find the pannel, his giving the defunct, "the time and place libelled, the mortal wound with a sword, whereof he died, "relevant to infer the pains libelled; and find the pannel, his being alone the "time and place foresaid, and a scuffle then happening betwixt the defunct, with "two or three more in his company, and the pannel, and after a beating with "staves betwixt the said men and the pannel, the said pannel, his retiring and "calling for the guard, and being mutilated in the hand before he gave the said "mortal wound, a defence relevant to restrict the said libel to an arbitrary punishment." The jury, Jan. 26. 1713, found, That there was proof of the slaughter, and none of the deceased having been in the scuffle. Upon which the pannel had sentence of death.

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April 1. & 2.
1691.

July 24. 1690.

tire, and find shelter among the bystanders, or otherwise; if instead of doing so, he deliberately wait to receive the onset, and will not give back; he cannot allege that he kills purely to save his life: he kills to indulge his temper, or for the sake of his opinion, which, in the estimation of the law, is a false and a wrong opinion, and one which he must be taught to abjure in time to come. I may here quote the words of the interlocutor on the libel against Captain James Bruce and others, indicted for the murder of Simpson and Linklatur, two soldiers of the city-guard of Edinburgh. They pleaded, that they were violently assaulted by the guard, when drinking the King's health at a bonfire on the street. But this defence, the Court repelled "unless the pannels prove, that before the killing of Henry Linklatur, they were (by the guard's aggressing them), put in present danger of their lives, *and could not otherwise escape.*" In the case also of John Macmillan, where the assault was alleged to have been made in the like situation, one of the circumstances which the jury find, and on which the Court proceed to give sentence of death is this, "that he might with ease have made his escape, so as to save his life without drawing his sword." On the same principle, one who will stand a mortal assault, rather than render himself to the officers of justice, because he is innocent of the matter that is laid to his charge, or because they mistake him for another man, (which error he observes, and fullenly declines to explain), is, by this vice of temper, or unsoundness of head, reduced to a far more difficult and more unfavourable plea than self-defence. These are things in which it is his duty to comply. He ought to yield though he be innocent; and he deals most unfairly, and even cruelly with the officer of justice, not to inform him of his mistake.

It

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It would be easy to put many other cases of a like nature, in which, though the survivor is not the first to assault, yet he kills out of a necessity (if it may be called so), which is occasioned by his own will, and choice of a course of conduct. I shall only farther explain this matter, (if I may be allowed to use so familiar an illustration), by what is related, (and I believe is true), of some noted sword's-man, who laid claim to the sole privilege of walking upon certain boards of the floor of the coffee-room which he frequented. This pretension had long been submitted to; but was at last wittingly and deliberately disputed, by a gentleman, who fought with this usurper on the spot, and killed him on his own domaine. Certainly, it cannot be thought that the place suffered a great injury in the loss of such a member of society. Yet, in a trial for the homicide, this champion of the public right could hardly have had the benefit of the plea of self-defence. For, in substance, the case was much the same as if he had appointed to meet his antagonist in that place, and to fight purely for possession of the spot. In short, in all cases of this description, the survivor shows nothing of that aversion to shed the blood of his neighbour, which is a necessary ingredient of the plea of self-defence; but rather a sort of quarrelsome obstinacy, which courts and invites the assault.

3. To have the benefit of a full and entire justification, the pannel must have observed the due temperance and reserve, (*moderamen in culpata tutela*, as it is termed by lawyers), in conducting his defence. The meaning of which is, that with respect to the weapons employed, the season and the way of using them, and in all other particulars, he must have confined himself to that just degree and measure which were requisite towards his own safety, and have done what in him

Moderamen in culpata tutela;
what it is.

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him lay to take himself out of the strife, without shedding the blood of the invader. For if in any of these points there have been excess or precipitation on his part, some reprehension proportioned to the error will attend it; true though it be that he was in danger of his life at the time of killing, and struck the mortal blow for his own protection, and not out of any malice or revenge. Thus with respect to weapons. One is suddenly invaded and beaten with a club, poker, or the like dangerous weapon, by a person of superior strength, and in a chamber from which he cannot readily escape; and in this situation, to save his life, he draws his sword and kills. It is however proved, that he might have found in the apartment the like weapon to that with which he was attacked; or that by cool and skilful management of his sword, he might have made good his retreat from the chamber, without sacrificing the aggressor's life. That he has done otherwise, may, and, with the aid of the proper circumstances in evidence, will be presumed, to have been owing to the alarm and trepidation which are natural on such an occasion, and not to any cruel or malignant purpose. But though this disorder of spirits be sustained as an excuse to him; still it is in some measure a blemish in his conduct, and deprives him of the benefit of an absolute and entire justification.

*Excessus Mod-
eraminis.*
Feb. 20. and
Mar. 3. 1710.

It is in this sense that we are to understand the interlocutor in the case of John Govan, which finds the pannel liable to an arbitrary punishment, at the same time that it implies him to have been in danger of his life. "They find the libel relevant
" to infer the pains of death; and sustain the defences propo-
" ned for the pannel in these terms, *viz.* that the pannel was
" attacked by the defunct and his associate with opprobrious
" words,

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“ words, and beating of him, so that he was necessitat to fly
 “ and betake himself to his house, and the defunct with his
 “ associate returning and invading the pannel in his house,
 “ and there renewed the scuffle by beating of him, and the
 “ pannel, *in dread and fear*, laid hold on a sword for his
 “ defence, endeavoured to repel the violence, and force
 “ them out of his house, and that during the continuance of
 “ this scuffle, the pannel gave the defunct the deadly wound,
 “ either in the house, at the door of the house, or before
 “ the door, relevant to restrict the libel to an arbitrary pu-
 “ nishment.” Probably, this is also the just construction of

the interlocutor in the case of John Macmillan. Macmil- July 24. 1690.
 lan had killed Grierson, by stabbing him in the belly with a
 sword. He stated in defence, that Grierson had set upon and
 beaten him with a great staff, to the danger of his life, which
 obliged him to draw his sword; and that Grierson's servant
 then laid hold of and stopped him, till Grierson struck him
 several violent blows more. The interlocutor was thus:

“ And as to the qualification of self-defence, find that de-
 “ fence, that the pannel was assaulted and beaten by the de-
 “ funct, with such a great batton or rung, as might have
 “ brained or killed him, and could not get fled, nor save his
 “ life otherwise, *than by drawing his sword*, after he was so
 “ assaulted, relevant to liberate the pannel from capital pu-
 “ nishment, but prejudice of inflicting an arbitrary pain,
 “ as accords.” Now the words of this judgment are to
 be attended to. If they had been, that the pannel could not
 save his life *without stabbing the deceased*, certainly the judg-
 ment would have been unjust in subjecting him to any
 punishment at all. But the hypothetical state of facts,
 to which the interlocutor applies an arbitrary punishment,
 is only this, that he could not escape *without drawing his*
sword.

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sword ; which leaves the case open to this construction, that by the due management of that weapon, against a person attacking with a staff, he might have secured his retreat, without striking a mortal blow.

Nov. 9. 1685.

THERE is likewise excess in the *degree* of the violence by which the pannel has warded off the danger of his life ; if out of extreme fear and agitation, he has continued it longer, or has done more, than was absolutely necessary to disable the invader. In the trial of Urquhart and Webster for the slaughter of Simpson, it was urged in behalf of Webster, (for Urquhart was alleged to have had no concern in the violence), that the deceased had bruised him with a large staff or baton, thrown him to the ground, and trodden upon him to the danger of his life. In reply, the prosecutor allowed the relevancy of this plea, but observed, that there was at least an *excessus moderaminis* on the part of Webster ; as he had brought Simpson to the ground with a blow of a staff, and had afterwards so bruised and abused him, as to break his ribs, and occasion death. The Court find the libel relevant to infer the pain of death ; “ sustain the answer of self-defence relevant to elide the ditty ; and find the reply of excess relevant to take off the defence.” An ambiguous verdict was returned ; and the issue was, that in terms of the statute 1661, both pannels were decreed in a certain sum to the relict and children of the deceased, and were ordered to go, during the pleasure of the Court.

Excessus Moderaminis as to time.

AGAIN as to time. If John is in the act of drawing his sword on James, and James rush in upon and kill him before it be fully drawn, there is here also a precipitation and excess, for which the killer shall be answerable to the law. Yet it may nevertheless be a just case of self-defence. For let

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let it be supposed that the deceased was a noted swordsman, and of superior strength to James, and a man too of a known cruel temper, and that he had posted himself by the door of the chamber, so as to hinder James from escaping; certainly James was in plain jeopardy, and had good reason to dread the worst. Yet, as there is an apparent precipitation on his part; a departure, in some measure, from that strict and scrupulous caution, which the law would recommend and enjoin in so interesting a particular; he cannot be dismissed entirely free of censure or rebuke. In another sense, any excess in the article of time, seems to be scarcely reconcilable to the just notion of self-defence. This is, where the slaughter is not instant upon the attack or danger, but at some interval of time. For in this situation, at least if the interval is of any length, the deed can only be attributed to the principle of revenge; which always makes a case of murder. With this in some measure coincides the excess in point of place; which is, if the pannel beat off the assailant, and pursue him any considerable way in his retreat. In either of these situations it is not an *excessus inculpatæ defensionis*, or nimious violence in defending, but an *excessus defensionis* simply; an act of aggression, and an entire departure from the defensive line of conduct.

TOUCHING these several modes of excess, it would be a vain attempt, (though not untried by the Civilians), to reduce them, and the different possible combinations of them, under a few general and invariable rules. By the very nature of every such question, it is a question for the consideration of the jury, and which must be resolved on a complex view of the whole case; wherein regard is had not of this or 'tother article only, which *prima facie*, or gene-

Limitation of the
moderamen tute-
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X x

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rally speaking, may be accounted unfavourable to the pannel, but of all and whatsoever those circumstances of the situation, which may reasonably be supposed to have affected him at the time. And one consideration there is on his part, which ought always to be duly weighed; as indeed, unless this be done, the foregoing rules would circumscribe his plea within too narrow bounds. I mean the danger to himself, from too great tenderness to the invader, or an excessive backwardness in defence; the effect of which may be, that he loses the proper season of defending himself to advantage, or with effect. Thus, though it be a point of duty to retire from the assault; yet this is always to be received under provision that the assault be not so hot, as makes it difficult to retire, and so that in retiring the person do not materially encrease his own danger, or put himself to a plain disadvantage for conducting his defence: As if he have to retire down a dark or steep stair-case, or by passages better known to the invader than to him. On the same ground it cannot be exacted of him, to wait till the pistol is in the very act of being fired at him; or if the enemy have drawn, and be rushing towards him, he may meet him with his fire, before the point be at his breast. This seems to be allowed by the judgment in the case of Captain William Barclay, of which Mackenzie gives some, but rather an incorrect account. The interlocutor is in these words: "The Justices repels the haill defences and " qualifications proposit for the pannells in respect of the " reply; and finds that the qualification of self-defence is " relevant in this case, that the defunct Sinclair or his accomplices were the first aggressors, without any just provocation given by him, and that he woundit the pannell's

Nov. 12. 1668.

"nell's brother or servants, and thereafter *pursued the pannel with a drawn sword or bended pistol.*"

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IN like manner, it is generally true that one is not to use a mortal weapon against that which is not mortal. Yet this also has its exceptions. If two persons set upon one and invade him, the one with a sword, and the other with a staff, which the latter uses to disconcert him in his defence, so that he may be laid open to the assault of the former; is it to be doubted that the ordinary rule of measuring weapon against weapon is set aside, and that he has right with any weapon, or in any the most speedy way, to dispatch this base and insidious assistant?

4. EVEN when all these considerations unite in support of the pannel's plea, as relative to the moment of killing, they may however be accompanied with one circumstance more, which shall hinder them to work his absolute justification and acquittal. This is, if in any degree the pannel has himself been the cause of the fatal strife. John and James deliberately appoint to fight with mortal weapons; and in the course of the combat James is wounded and retires, and calls to John to desist; which John refuses, and follows up his advantage so hotly, that James, purely to save his life, is at last constrained to kill. If, as seems more probable, this is not even a case of murder, at least it gives no room for the proper plea of self-defence; because the danger and necessity are the act of John himself; are the result of a situation, which he has deliberately courted. In the case of Robert Robertson, it was even judged to be murder in the survivor, notwithstanding the more favourable plea, that on *coming to the field* he earnestly declined the com-

What if the Killer occasioned the Assault.

No Self-defence in cases of Duel. Aug. 4. 1673.

X x 2

bat,

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bat ¹, and was threatened, and abused, and drawn upon by the deceased; so that he had no choice, but was necessitated to defend his life: And of these things he offered proof. But, though urged to the effect of alleviating only, this defence was disregarded; and the libel alone was remitted to the assize ². Much less, therefore, will the excuse serve, if the parties have gone to the field, though in heat of blood, and on a sudden quarrel, and have fought fairly, without either of them giving back or declining the strife. By our practice, this is nothing less than murder; as was determined in two cases, after full debate on the question.

June 17. 1670.

THE first is the case of William Mackay, and was shortly thus. Mackay, a taylor, being in the castle of Edinburgh, had quarrelled with a soldier who was in company with him, drinking; and blows had passed between them. Mackay said to the soldier, that he durst not fight him, or use him so, if they were beyond the gates of the castle. They then left the castle together, and went to the city, and got swords, and from thence proceeded to the fields (the King's Park), where they first fell to blows, and afterwards drew and fought fairly; and the soldier was killed. In these circumstances, Mackay, beside denying the challenge, offered to prove that the deceased was the aggressor, and drew on him, and obliged him to defend his life. The prosecutor answered, that he would prove the challenge and appointment stated

¹ " So that *esto argumenti causa*, he had gone to the cräigs with him, yet having repented him on the place, it was lawful for him to have refiled; like as, *de facto*, he did refile and refused to fight; but being forced thereto by the defunct, it was necessary for him in his own defence to draw his sword."

² " Finds the indictment relevant, notwithstanding the defence and duple, and remits the same to the knowledge of an assize." I have not found that this prosecution came to any issue: the diet was continued from time to time.

stated in his libel. The Court repelled the defence ¹, and the pannel was convicted and condemned to die. HOMICIDE.

THE other case, that of James Gray, was that of combat between two persons who quarrelled in a tavern, and left their party with a purpose to fight; and fought accordingly hard by the house. The defence and libel were both remitted to the jury ², who found, "That the pannel did commit the said slaughter upon the defunct Archibald Murray, and that with one vote; and as to the second part, *relating to the pannel's self-defence*, they find no such thing proven; but on the contrary, *that the pannel and defunct came both out from their company, most likely upon one and the same design.*" The pannel had sentence to lose his head.

No Self-defence
in Cases of Duel.
June 10. & 11.
1678.

In the case of an appointment to fight, the parties are on the same footing, and equally in the wrong. The same rule of judgment will therefore *a fortiori* apply, where-soever the survivor was himself, in the main, the provoker of the quarrel, and by his own misbehaviour excited that resentment, against which in the end he has found it necessary to defend himself, by the slaughter of his antagonist. Upon words between John and James, John strikes a blow; whereupon James draws and assaults John; who also draws, but

What if the
Killer gave Pro-
vocation.

¹ "Repels the defence proposed for the pannel, as the same is alleged complex-ly, and ordains the dittay to be put to the knowledge of an affize." The libel was laid both on the statute against duels and at common law.

² "The Lords find the libel relevant, and that there is no necessity of any distinct probation for proving precogitate malice, and remits the libel," &c. As also, "They find the exception of self-defence *simply proposed*, relevant, and, refuses to grant precognition upon the qualifications and circumstances mentioned in the defence."

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Aug. 18. & 19.
1691.

but retires, defending himself, as far as he can; till being put to the wall, he is at last necessitated to kill, having no other means of escaping the danger. This slaughter cannot be accounted less than culpable homicide, being the result of a necessity, which the survivor has occasioned by his own wrong; a wrong for which, even if it had not been attended with so fatal an issue, some atonement on his part would have been due, and much more where it ends in the destruction of the injured person. Judgment went upon this ground in the case of the Master of Tarbat and others. These persons were charged with the murder of Elias Poiset, a French gentleman, whom they had met in a tavern, by running him through the body with a sword. They gave this account of the matter for themselves: that the deceased, along with his brothers, George and Isaac Poiset, and another Frenchman, the Sieur de la Massie, had entered the hall of the tavern where the pannels were sitting by the fire, and there attacked them with swords and pistols; which obliged them to kill in self-defence. It was set forth in reply, (and in part it was admitted by the pannels), that they had previously intruded into George Poiset's chamber, where he was in bed, and had abused his person; and that after being turned out, they had again alarmed and disturbed him, by beating on the chamber-door. Accordingly, the defence was found only relevant, to restrict the libel to an arbitrary punishment ¹.

IN

¹ " Find the defence, that the slaughter was committed in self-defence, relevant in thir terms, viz. That after the said pannels, in the first libel, came out of George Poiset's chamber, and after their second attempt, by beating and raping at his chamber-door, and that they were set down peaceably at the fire-side, the defunct and his brethren, and Mr de la Massie, came into the room " and

IN the case of any assault, as above imagined, of a violent or painful nature to the person, there seems scarcely to be room for difference of opinion. But neither ought it to turn the scale in favour of the pannel, that he did not assault to hurt the body, but in some of those other ways, which argue less of anger than contempt, and for that very reason, at least among persons of a certain rank, are perhaps only so much the more difficult to be endured. The case of Lieutenant Robertson may be consulted with relation to this point. Upon the whole case *as proved*, there may be no reason to think that much injustice was done by the general verdict of acquittal. Yet the Court could not properly have given an interlocutor on his defence, as relevant to exculpate; because, though grossly insulted and reviled, he had himself been the immediate author of the combat, by a contumelious assault on the person of the deceased; having risen from the table where he was writing, and having crossed the room, and pulled the deceased by the nose.

THERE does not even seem to be any good reason, why he should not be liable to the moderate correction of fine and imprisonment, appointed by the statute 1661, who brings the assault on himself, by the provocation of contumelious words, or derisive signs and gestures. However blameable so ardent a temper in the deceased, and though it would have been murder in him, if, in revenge of the taunt, he had instantly killed the reviler; yet, as the event has happened, this person cannot be held free of blame, who knowing that temper, applied such incentives to it, or if he knew it not, was
rash

HOMICIDE.

What if the Killer gave Provocation.

MacLaurin's Cases, No. 68.

" and assaulted the pannels, by presenting cocked pistols to them, or thrusting at them with drawn swords, before the pannels made any violent opposition to them, relevant to restrict the libel to an arbitrary punishment."

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rash enough to make so dangerous a trial of what it might prove to be. Though his words were not a provocation to justify, or even to excuse the killing of him, and make it less than a capital crime; it does not follow that they are therefore no wrong at all, and insufficient even as a ground of censure on the speaker, being himself the survivor, and the slayer of the very person, to whose resentment (within certain bounds), his insolence had justly exposed him. If the law of England, without enquiry, presumes a wrong in the survivor, in every quarrel which issues in homicide *se defendendo*, we certainly will go the length of attending to any actual, though but verbal wrong, that is proved against him.

I HERE conclude my enquiry concerning homicide in self-defence, the last species of that homicide, which is termed justifiable, and does not expose to any sort of correction. In explaining it, I have necessarily introduced some instances of another sort of homicide, of which we are next to treat, namely, culpable homicide, which implies blame in the killer, and is followed with punishment, more or less considerable, according to the quality of the fault.

V. CULPABLE HOMICIDE appears to be of several kinds and degrees; which are grounded in different reasons.

1. IT has been said, and does not stand in need of farther illustration, that it is culpable homicide, where slaughter follows in the doing even of a lawful act; if it be done without the due caution and circumspection for preventing injury to others.

2. IT

2. It has also been said, that it falls under the same consideration, if death ensue on the doing of an unlawful and prohibited thing; such as the discharging of fire-arms, or the throwing of stones or fire-works in the streets of a city, or the whipping of a horse there, so that it springs forward, and kills a passenger.

HOMICIDE.

3. A THIRD case of culpable homicide, also incidentally taken notice of, and which may sometimes stand higher in the scale of guilt than either of the others, is where death ensues by misadventure, without the intention of the killer, and in an unforeseen and unlikely manner; but withal on a purpose to do some sort of bodily harm to the deceased. If John and James, persons of equal years and strength, happen to quarrel, and John strike James a single blow with the hand, which unhappily kills him; or if John thrust James aside, and James slipping a foot fall to the ground, and have his skull fractured, and in consequence die; in either of these cases the death is an extraordinary casualty, such as no one who strikes in that fashion can fairly be presumed to have intended, or to have thought of as a probable or even possible event. Yet as John is blameable, in that he uses any manner of violence to the person of his neighbour, and would be liable to some censure even on that account, if nothing more happened; and as his neighbour has actually died of this violence; so, for the sake of example, and the satisfaction of the public, as well as of the relations of the deceased, he shall, within certain bounds, be answerable for the mortal consequence, which it will here, without much enquiry, be presumed that nothing but great indiscretion on his part could oc-

Culpable Homicide by Misadventure.

Y y

caſion.

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Cases of Death
on a Purpose of
Flight Injury.
July 13. & 29.
1674.

Jan. 2. & 23.
1710.

caſion. Many caſes might be cited in illuſtration of this part of the law. I ſhall confine myſelf to the following.

WILLIAM MASON was indicted for the murder of William Ralſton, by beating him and throwing him againſt the ſharp corner of a cheſt, or chair; whereby he was wounded in the temple to the effuſion of his blood in great quantity; of which injury he died. The pannel ſtated ſundry pleas, ſuch as ſelf-defence, caſual homicide, and that the wound, of itſelf, was not of a mortal nature; all which, as well as the libel, were ſent to the aſſize. But the Court were of opinion, that even as laid in the libel, the charge was not of that nature, which implied either a mortal or a highly injurious purpoſe to the perſon of the deceased; and they therefore found it only relevant to infer an arbitrary pain¹. The like relevancy was found upon the charge againſt William Bathgate; where the manner of the death was ſet forth to have been by beating the deceased and throwing him to the ground, but without mention of any weapon uſed againſt him, or of any wound inflicted on his perſon².

I

¹ “ Finds the libel as it is libelled, only relevant to infer *panam extraordinariam*, and remits the ſame to the knowledge of an aſſize; and alſo remits the “ defences proponed for the pannel, *viz.* That of caſual homicide, ſelf-defence, “ and that the wound was not of itſelf mortal, likewiſe to the knowledge of an “ aſſize.” The aſſize found, “ that what was committed by the pannel was in “ ſelf-defence.” He had ſentence to pay the ſum of L. 247 Scots to the widow of the deceased.

² “ The Lords find the libel as libelled only relevant to infer an arbitrary “ puniſhment, and ſuſtain,” &c. as formerly quoted.

On the circuit at Aberdeen, in September 1792, this verdict was returned againſt George Sellar. “ Find it proven, that at the time libelled the pannel “ George

I SHALL next cite the trial of John Graham, for the murder of John Russell. After relating that the deceased had met the pannel and his son on the highway, driving cattle, and that without any provocation, they with opprobrious language and threats, ordered the defunct *to go off*, the libel proceeds thus; "and the said John Russell then running off " was beat by the said John Graham elder and his son, or " pursued and chased by him and his said son John, with " sticks or staves, or other mortal and offensive weapons, on " horseback, and wounded to the great effusion of his blood, " and obliged by force and violence, or terror and fear of " their cruelty, to run into the water of Nith; which with " the violence of the stream carried him down, so that at " some distance he was found dead." Now here was a plain abuse of Russell's person, which issued in his death. And yet, as related in the libel, the assault could hardly be said to justify a charge of murder; since Russell rather appeared out of excessive fear and terror to have thrown himself into the stream, than to have been under any necessity of doing so, to save his life. At least this was the view in which the matter had occurred to the Court. For though they found a capital relevancy on the general and concluding charge, that at the time and place libelled the deceased was murdered, and that the pannel was art and part thereof; yet with respect to the above facts related in the libel, they were of a different opinion, and found as follows. "*Separatim* " find, that he the pannel, time and place foresaid, did either " by himself, or by hounding out his son, pursue and give

Y y 2

" chase

HOMICIDE.

Cases of Death
on a Purpose of
Slight Injury.
Mar. 1. & 8.
1727.

" George Sellar did strike the deceased Robert Paterfon a blow on the head with " a click or clip, and that Robert Paterfon died in consequence of that blow: " But find no proof of malice against the pannel, and recommend him to the " mercy of the Court." He had sentence to be imprisoned for six months.

CHAP. VI.

“ chace to the defunct with sticks or staves, and thereby
 “ forced him into the water of Nith, wherein he perished,
 “ and thereafter was found dead, relevant to infer an arbitrary punishment.” The jury found the libel not proved.

Cases of Death
 on a Purpose of
 slight Injury.
 Dec. 7. 18. 19.
 1724.

I FIND a fourth illustration in the case of Gaspar Reyfano, an Italian, who was charged with the murder of Robert Lamb, by throwing him backwards down stairs; whereby he received a wound in the head, of which he died¹. It appears that the stairs were winding, or (as they are provincially called), turnpike-stairs, and that the deceased, who was much in liquor, had fallen backwards down seven or eight steps at the foot, so that his head lay out at the threshold. On the whole circumstances of the case, as shown in the libel, the Court had been of opinion, that though the pannel was criminal in pushing or striking the deceased in so hazardous a situation, yet he could not be held to have been actuated by a mortal purpose. They therefore found the libel only relevant to infer an arbitrary pain. And on conviction

¹ “ Did upon the 25th, or one or other of the days of August last, without
 “ any just provocation, wilfully and violently throw the said Robert Lamb, who
 “ was then lodging at your house in the Canongate head, over the stair of your
 “ said house, upon which he fell and received a wound or bruise upon his head,
 “ near to his right ear, or upon some other part of his body, whereof he died
 “ next day, or soon thereafter.”

On the 7th of August 1741, Lillias Brown was indicted for the murder of Mary Mitchell, “ by forcibly pushing or flinging her headlong down the stair of her
 “ own house, whereby she received a wound in her head, and a fracture of her
 “ arm, or wounds or fractures one or more on some part of her body, of which,
 “ or of a fever and mortification thereby contracted, she died in a few days
 “ thereafter.” This woman was banished Scotland for life on her own petition, on the 13th August, after informations recorded on the case.

tion in the precise terms of the charge, he was adjudged to HOMICIDE.
be transported for life¹.

VERY analogous to this, but brought to an issue favourable to the pannels, was the case of Thomson and Aberdeen, who were charged with the murder of William Michie, thus. Jan. 23. 1769.
“ He was met or attacked by the said Andrew Thomson and Alexander Aberdeen above complained on, who, or one or other of them, without provocation, either pulled or pushed the said William Michie from off his horse, where- by he fell upon the pavement, and either fractured his skull, or bruised the same so much, that he expired in the afternoon of the day following.” This libel was found only relevant to infer an arbitrary pain. And the pannels were saved even from this, by a general verdict of acquittal.

A CASE somewhat different from any of these, as to the mode of the intended mischief, was tried at Perth on the 29th September 1784. Henry Inglis, and Andrew and Robert Colvilles, were charged with culpable homicide, in having mixed
Cases of Death on a Purpose of flight Injury.

¹ December 14. “ The Lords find the libel relevant only to infer an arbitrary punishment, and repel the defences against the said relevancy, and remit,” &c.

December 19. “ The jury find it proven by concurring witnesses, that Gaspar Reyfano, pannel, did upon the day libelled, or thereabout, throw the defunct from the door of the said Gaspar Reyfano’s dwelling-house, backwards, down the stair, by which fall the defunct received a bruise or wound on the head or right ear, whereof he died next morning.”

In March 1721, Hugh Sandilands, a lad of fifteen, who had killed his fellow-servant, a grown man, with one stroke of a dung-fork, was indicted for murder; and informations are recorded on the case. He was afterwards transported on his own petition. I say so on authority of a note written on the printed papers. For the case drops out of the record.

CHAP. VI.

mixed snuff, or some other hurtful stuff, with spirits, or some other liquor, and administered it to a certain person as a draught; in sport probably, or at worst meaning to make him sick. The libel was found relevant as laid; but the proof was defective, and the pannels were acquitted.

If the law be so in these cases, it seems to be no less reasonable that the same judgment should pass upon a woman who deserts and exposes, and thereby kills her infant child; though she do it in a way not likely to destroy the child, as by the side of a highway, and in the day-time. For still she does a very wrong thing, and subjects the child, more or less, to the hazard of what may happen. But of this more fully afterwards.

Case of a Master killing Pupil by Correction.

In the same view notice may be taken of the situation of a preceptor, who has been so unfortunate as to destroy his pupil, by excessive correction of his person. By reason of the favour and privilege of his situation, this severity shall ordinarily be ascribed to the due motive; but it is not therefore to be entirely pardoned, being so great an intemperance, and in such a person, but shall only save him from the pains of murder. Nor shall he be saved even from these, if the excess be so great, as can only be imputed to special malice, or a cruel disposition: as if by inventing extraordinary ways, or using dangerous and unusual instruments of discipline, he furnish evidence of his depraved will. And of this opinion our Judges had been in the case of Robert Carmichael, on the excesses as charged in the indictment¹; though on the facts as found in the verdict,

Jan. 1. 8. 10.
16. 19. 1700.

¹ " They find the indictment, as it is so declared and amended, relevant to
" infer the pains of death; and find any of the qualifications libelled in the in-
" dictment,

verdict, the culprit escaped with a very gentle (I had almost said a nugatory) sentence. Indeed, many have thought that even on the verdict there was room for a more severe construction. Whether the pannel had firmly resolved to dispatch his victim on the spot, (as in truth he did dispatch him), will not determine his guilt; for clear it is, (which often amounts to the same in law) that he meant to do him a dangerous, excessive, and outrageous bodily harm, and committed such flagrant abuse of his person, as showed an absolute and complete indifference about him, whether he should live or die.

HOMICIDE.

I SHALL now dismiss this article, after observing, with respect to the presumption on the subject, whether it be that the pannel meant death, or some great mischief, or only some inferior injury, that no general rule can be laid down, which shall be very serviceable in practice, or shall not be liable to frequent exceptions. It may seem reasonable, in the case of a blow or two struck with the hand, or with some ordinary and seemingly harmless implement, that the presumption shall be in favour of the pannel, that he was not actuated by a very injurious purpose. But even this is only generally true, and entirely fails in the case of a stout and
grown

Is the *animus occidendi* presumed in such Cases.

"dictment, death immediately following, relevant, *separatim*, to infer an arbitrary pain." January 15. 1700.

The verdict is in these words: "Find it proven that the pannel did three times, *ex incontinenti*, severely and cruelly lash and whip the defunct upon the back and hips, and in rage and fury did drag him from his desk, and did beat him with his hand, upon head and back, with heavy and sore strokes, and after he was out of his hands, he immediately died; and finds it likewise proven, that after the defunct's death, the side of his head was swelled, and blue marks seen thereupon, with several marks of stripes, from the small of his back to his houghs."

CHAP. VI.

June 29. 1664.

grown man, who smites a woman, or a boy, or an infant, or an aged and very infirm person, in that manner, and with all his might; a mode of assault as likely to prove mortal to such a one, as in the case of one of his own years it is, if he strike him with a stone or a club. Nay, the very words uttered by the pannel on the occasion, if they be very malignant and rancorous, and more especially if there have been waylaying of the deceased, and previous threats of destruction, may be expositive of the intent in such a manner, as to maintain the prosecution for murder, though committed with a very unlikely weapon. Accordingly, dittay was, without hesitation, sustained against Malcolm Brown, miller in Lenox-mill, for killing William Stark, a young boy, by striking him a blow on the ear with the hand; whereby he became instantly deaf, and languished for some time, and died. The pannel maintained only this defence, that the boy died of some other ailment; and on this ground it probably was, that he had a verdict of acquittal.

THERE is thus no just and general rule but one, that the intent must be gathered from the whole circumstances of the case; by the Court, when judging of the relevancy, according as the story is related in the libel, which at that period is held for true; and by the jury, according as the fact appears upon the evidence. With respect to which, even though the pannel bring no proof in exculpation, such *indicia* (or *tokens* as they were once called) may appear on the prosecutor's proof, as shall justify the jury in acquitting of the higher offence.

Culpable Homicide on Provocation.

4. I now pass from those cases, where the homicide is in this sense accidental, that it happens without the intention of the killer, to those, certainly more criminal cases, where
the

the killer has a mortal purpose, and yet is not in the first degree of guilt as a murderer: for this reason, that he is not stirred to the deed by wickedness of heart, or hatred of the deceased, but by the sudden impulse of resentment, excited by the provocation of high and real injuries, and accompanied with terror and agitation of spirits. HOMICIDE.

To judge such a slaughter as a pure involuntary act, like that of a brute or a madman, which is the object of neither praise nor blame; this certainly is a course for which nothing of any weight can be urged. For although, along with other animals, we are subject to the impulse of resentment on injuries, which is necessary to our preservation; yet it is not in our species, as in theirs, a blind and ungovernable impulse, which transports us whithersoever it will; but has been placed by the Author of our nature, under the controul of a superior principle, which may serve to restrain it within those just bounds, where it answers its proper ends; and by means of which, if duly and habitually exerted, not only the conduct of the man on any particular occasion may be regulated, but even the feeling itself be in a great measure chastened and subdued: so that the very things which are done for self-defence, shall be done calmly and with measure, and less out of rage or animal passion, than from considerations of justice and necessity. To gain this state of self-command, is part of every man's duty, according to the degree that is attainable to him, in his way of education and course of life; and so far to fall short of it, as mortally to avenge any insult or injury which neither is attended with danger to one's life, nor is impossible to be repelled and chastised by gentler means,—this, without a doubt, is a culpable and criminal excess, such as in any well

Grounds thereof.

CHAP. VI.

constituted mind will be followed with long regret, and which the magistrate cannot pass over without severe reprehension. A conclusion which will only be the more confirmed, when he reflects on the great frequency of such scenes of provocation, and how prone the nature of every man to judge too hastily, and too highly, of any wrong which he happens to sustain. To put men therefore on their guard in this respect, and form them, as much as may be, to a previous habit and disposition on the subject, which may serve as a corrective of sudden passion, the law of all civilized countries, has condemned all homicide that is done on provocation, though grievous, and difficult to be withstood, as a high crime, and the fit subject of exemplary correction.

Grounds of
culpable Homicide on Provocation.

BUT while we thus entertain a well grounded jealousy of every man's partiality in his own case, and have a due regard to the peace and order of society, which are so deeply concerned in the repressing of such excesses; yet, on the other side, we cannot as men be insensible to the wide difference in respect of guilt, between the homicide which has no cause but in the wickedness of the killer, and that which is only in retaliation of fore and alarming injuries received upon the spot, and has thus the double excuse of bodily pain, and perturbation of spirits.

It may indeed be said, that in one point of view, there is more need of severity applied to sudden than to wilful and malicious homicide; on account of the greater frequency of the inferior offence. But no more in this than in other cases, can we, in judging between man and man, put the feelings of human nature out of question on views of policy; or forget what the degree of perfection is, to which our constitution

constitution permits us to aspire. To keep the allowance for the frailties of our condition within as narrow bounds as we safely can,—this is a right and necessary course; because by means of such discipline we may improve and be corrected. But to have some consideration of those frailties, so as only to punish them in their degree as such, and not in the same rank with the foulest and most odious crimes,—this is no less a just and salutary rule; if the punishment is meant to have its due effect as an example, and the people to be conciliated to the course of criminal justice. And here let me add, that those who argue for the reception of this plea into the law, are not, as at first it might be thought, appearing on the side of mercy. For if in every case the manslayer is to make atonement with his life, without regard to the provocation, however high, which he has suffered; then may it be expected that juries will find a general verdict for the pannel, whensoever they cannot reconcile this severity to their own conscience; and thus, (as actually happened in the case of Finhaven), the pannel shall be dismissed without even that punishment, which his intemperance deserves. Now the allowance of the inferior denomination of homicide, while it saves the offender's life, keeps him liable to some correction proportioned to his fault, and maintains this sort of slaughter in its due place in the public opinion as a crime.

ALL considerations, therefore, issue in one conclusion. The invader, who offered the injury, knowing as he did the resentment which it behoved to excite, was therein guilty of a wrong; and justly merited to receive upon the spot, a severe chastisement of his person. And though the due measure has been far exceeded; yet it were (I had almost said) no less excessive, to condemn this culprit to death, who

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has not sinned out of cruel disposition or wickedness of heart, and is neither that object of aversion to his neighbours, nor that same irreclaimable and hopeless member of society, as the wilful murderer, on whom mercy and pardon were thrown away. Punished he ought to be, that he may stand corrected, and others be taught the lesson of patience by his example; but there is no reason why he should seal his repentance with his blood, which, in civilized times, neither the frequency of the offence, nor the public opinion will demand.

Grounds of culpable Homicide on Provocation.

THESE seem to be the obvious and reasonable grounds, on which to maintain the distinction between culpable homicide and murder; the one punishable with death, the other at the discretion of the Judge. Reference has also been made in support of it to the Jewish law, and to the Roman; but, for my own part, I rather think, both unnecessarily, and without success. The texts of the civil law¹ seem rather to have relation to those cases, where the slaughter happens without intention to kill, and not to those, where the mortal purpose may be excused. And with respect to the Jewish law², though some of the passages may seem to be ambiguous; yet on the whole, they give countenance to this opinion, that even for a pure casual slaughter, that which happened by accident and misadventure, without evil purpose, the slayer stood in need of the safeguard of the sanctuary, to defend him from the vengeance of the kindred of the deceased; and that to any but him, even the city of refuge was no protection. And this is perhaps the natural course in

¹ L. 1. No. 3. ad leg. Corn. de Sicariis. L. 1. Cod. ej. Tit.

² Exodus, chap. xxi. ver. 13. 14.; Deut. ch. xix. ver. 4. 5. 6.; Numbers, ch. xxxv. ver. 15. to 28.

in the infancy of law and government, while the passions of men are violent, and crimes are less punished on any considerations of justice or policy, than to allay the passions of the individuals concerned.

HOMICIDE.

BUT concerning this it is truly of little importance to enquire: because clear it is, upon the testimony of our ancient statutes¹, that the distinction of murder and slaughter on suddeny, or *chaude melle*, as it was termed, (hot quarrel, that is, or heat of blood), had once been thoroughly established in the practice of Scotland. Not indeed on that regular and consistent plan, which is suitable to the improved jurisprudence of later times; but still in a substantial and efficacious form, such as commonly answered the purpose of saving the offender's life, and which sufficiently marks the sentiments of those times with respect to the degree of his offence, as contradistinguished to murder. It was the appointment of those laws, that the manslayer on suddeny was to have the benefit of the girth or sanctuary: He might flee to the church or other holy place; from which he might indeed be taken for trial, but to be returned thither, safe in life and limb, if his allegation of *chaude melle* were proved. Thus, though the form of the relief was defective, and the application of it irregular and uncertain, as it depended on the circumstance of flying to and reaching the girth; yet still (like the benefit of clergy in England, which had the like superstitious origin), it made a material difference in the law, and was a mark of the different opinion of the country with respect to the two modes of homicide.

Murder and
chaude melle;
Distinction of.

ON

¹ See act 1425, c. 51.; 1426, c. 89. 95.; 1469, c. 35.; 1491, c. 28.; 1535, c. 23. See also Mackenzie, Tit. Murder, No. 11.

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If abolished at
the Reforma-
tion.

ON the Reformation, when the privilege of sanctuary was abolished, this mode of relief was of course at an end. But as to the distinction of punishment in murder and *chaude melle*, which had hitherto been enforced by means of the *jus asyli*; whether the just consequence was that this also should be abolished along with that institution; this at least is not so clear a position. To those who think that the circumstance of sanctuary was not itself the ground-work of the doctrine, but an accident only in the external shape and mode of operation of a precept, which is founded in the first feelings of humanity and justice, it may rather seem, that, unless a statute had interposed to abrogate the distinction, it still behoved to have effect in law; and that it lay with the Judges of the land to devise some new and improved expedient, by means of which the ends of justice might with more certainty, and in a more consistent form, be attained. That this was actually done, does not appear from the books of adjournal. On the other hand, (though some rigorous examples may be produced), as little can it be said that they bear testimony of such a custom of judgment, or train of precedents, as absolutely to fix the law against the merciful construction.

Chaude melle;
if abolished by
Act 1661.

THIS, it has however been alleged, was afterwards done, by the statute of the 13th February 1649; which falling under the general act rescissory of the usurper's laws, was re-enacted by the statute 1661, c. 22.; and which ordinance, if in explicit terms it abolishes this humane distinction, or, being ambiguous, if it has been so construed by long and uniform custom, is without a doubt decisive of this important question. But these things are far from being past dispute.

THE

THE statute is entitled “ concerning the several *degrees* of HOMICIDE. “ *casual* homicide.” It proceeds upon a narrative of being intended to remove “ all doubt that may arise hereafter in criminal pursuits for slaughter.” And it enacts in these words: “ That the cases of homicide after following, *viz.* Casual homicide, homicide in lawful defence, and homicide committed upon thieves and robbers breaking houses in the night; or in case of homicide the time of masterful depredation, or in the pursuit of denounced or declared rebels for capital crimes, or of such who assist and defend the rebels and masterful depredators by arms, and by force oppose the pursuit and apprehending of them, which shall happen to fall out in time coming, nor any of them, shall not be punished by death; and that notwithstanding of any laws or acts of Parliament, or any practick made heretofore, or observed in punishing of slaughter.” Now, an argument is raised upon this ordinance; that being made for the settlement of all doubts in this matter, and bearing a full enumeration of those cases of slaughter which shall not be capitally punished, (cases all of them more favourable to the pannel than that of slaughter in *chaude melle*), it by necessary implication, excludes this last species, from the benefit of the privilege therein promulgated.

THE main answer to this argument has been : That under the name of *casual homicide*, and *casual homicide in defence*, the statute has truly made the exception of the very species in question. For that by these terms it does not intend a pure accidental and inculpable slaughter, about which there never could be any doubt that it was not liable to any penalty, far less to the pain of death, but homicide upon casual or occasional rencounter and sudden provocation, as contradistinguished to homicide *per industriam*, wilful murder, or of malice aforethought,

Chaude melle ;
if abolished by
Act. 1661.

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thought, and without excuse from heat of blood. In support of this construction it is urged; that not only in common language, but also in the writings of lawyers, both foreign and municipal¹, and in the texts likewise of the civil law, the term *casual* has often been used in this loose and larger sense, to signify any thing that happens suddenly, and on an unforeseen occasion; and that in this sense it may properly be, and has been applied to slaughter committed in *chaude melle*; where the meeting, the provocation, and even in some sort the mortal stroke, are all of them matters of chance and fatality, rather than design. Farther, and which is more material, it is argued, that in this sense the term is used in the rubrick of this very statute "concerning the several degrees of casual homicide," seeing that pure accidental slaughter admits of no degrees, but is always one and the same, and exempt from all manner of pain. Nay more, (proceeds the argument), in this sense it is even used in the body itself of the statute, and in that clause relative to "the case of *homicide casual*, and of "homicide in defence," which empowers the Judge to fine and imprison the offender; a provision utterly unapplicable to a pure fortuitous, and in all cases inculpable, act². As also

¹ "Nae slaughter done *by chance* or *chaude melle* sould be callit murder, for "all murder is committed of fore-thought felony." Balfour's Practicks, p. 512.

"Manlaughter committed voluntarily be fore-thought felony, or *casually by* " *chaude melle*, generally is punished with death," &c. Skene, of Crimes, tit. 2. c. 6.

² "Providing always, That in the case of *homicide casual*, and homicide in "defence, notwithstanding that the slayer is by this act free from capital punishment, yet it shall be leifum to the criminal Judge, with advice of the Council, to fine him in his means, to the use of the defunct's wife and bairns, &c. "or to imprison him. And that all cases to be decided by any Judges "of this kingdom, in relation to *casual homicide in defence*, committed at any "time heretofore, shall be decided as is above expressed."

also it is again used in the same sense in the concluding period of the statute, where it speaks of *casual homicide in defence*; a phrase which does not so well apply to any thing as to this of sudden slaughter, committed in defence against a farther injury, which there is reason to fear from the violence already suffered.

HOMICIDE.

IN confirmation of these and other arguments, which were urged with the first ability, in the noted cases of Carnegie of Finhaven and Mungo Campbell, reference may be made to a record, not mentioned on either of these occasions, but which as an evidence of the proper acceptation of the term *casual* or *accidental* in the Scottish practice, and also of the nature of that slaughter which is opposed in the law to slaughter on forethought felony, may seem to have its weight. What I allude to is the following entry in the criminal record, relative to a remission of slaughter for Thomas Crawford.

Claude melle, if
abolished by
Act 1661.
Aug. 1728.
Jan. 1770.

“ WEE his Majestie's Justice-deputes having considered
“ ane reference made to us be the Lords and Comissioners
“ of Excheqr, daited y^e seaventein day of August 1663,
“ beirand, That albeit the signator of remission under his
“ Majestie's royal hand granted to Hew Craford of Smid-
“ dieschaw for the slaughter of umq^l George Wylie, beares
“ his Majestie's information y^{of} to be, that it was done
“ upon *ane occasional rancounter without any forthought fellonie*,
“ *or malice betwixt them*; yet it being represented to the
“ said Lords, that the said slaughter was done *upon for-*
“ *thought fellonie*, and they being desyrous to be trewlie in-
“ formed y^{untill}, that they may stop or pass the passing of

Sept. 9. 1663.

3 A

“ the

CHAP. VI.

“ the said remission accordingly, they therefore desyred his
 “ Majestie’s Justice-deputes to take tryal of the maner of
 “ the said slaughter, and to repoint our judgment y’anent :
 “ As also, we having considered the said signator of re-
 “ mission and narrative y-of, with the depositions of the
 “ witnesss adducit before the said Comissioners of Excheq^r. ;
 “ and having re-examined the samen witnesss and sever-
 “ ral others witnesss adducit both be Wylie’s relict and
 “ for the said Hew Craford, upon consideration of the
 “ said haill depositions, we do humblie repoint our opinion,
 “ That the foresaid slaughter committed be the said Hew
 “ Craford was without any *precogitate malice or forthought*
 “ *fellonie* ; but that the samyen was committed *ex calore ira-*
 “ *cundie, upon occasion of reproachful speeches* uttered at the
 “ tyme amongst them, *being occasionally together* in ane ordi-
 “ narie way of friendship and familiarity drinking together,
 “ conform to the narrative of the said remission : because,
 “ *first* we find that the invitation to the alehouse where the
 “ slaughter was committed was from the defunct Wylie,
 “ and not frae Craford, who was both unwilling to go to
 “ the house with him ; and after the going was glade to be
 “ red of Wylie when he was going away. *Secundly*, Both
 “ Craford and the defunct Wylie denied that there was any
 “ *malice or envy* betwixt them ; and it may be seine that the
 “ malice was betwixt Craford and Wylie’s wyfe for misre-
 “ ports, or upon the account of any threatening words spo-
 “ ken by Craford before the act. We having examined the
 “ witnesss anent their knowledge of the ground thereof, we
 “ find the samyne so frivolous and little cause, that we can-
 “ not look upon them as grounds *of ane precogitate malice or in-*
 “ *tention to kill*, especially considering that their meeting to-
 “ gether at that time was *occasionally and accidentally* upon
 “ the

AGAINST THE PERSON.

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HOMICIDE.

“ the invitation and desyre of Wylie, and having gone with
 “ some others their neighbours in a familiar way together ;
 “ wheiras we conceive if the samyne had been committed
 “ *upon forthought fellonie or precogitate malice*, Craford would not
 “ have desyred so many persons to have gone in with them
 “ to drink to be witnesses thereto. *Thirdly*, After Wylie
 “ was going away and was past the spence door, and almost
 “ at the door of the fyre-house, he turned back again on Cra-
 “ furd, and yoked with him at the spence door, and when the
 “ candle was lighted *they found Wylie was above Craford*, and
 “ some of the witnesses depones, *that he had thrust Craford to*
 “ *the ground*. These and some other considerations moves
 “ us to report as aforesaid. In witness whereof, we have
 “ subscribed thir presents with our hands, at Edinburgh, the
 “ tenth day of September 1663.

“ *Sic sub.*

GEO. MACKENZIE,

“ JOHN CUNYNGHAM.”

Now, it is remarkable, that in this case, which happened so recently after the statute 1661, that which is opposed to slaughter *upon fore-thought felony or out of malice*, is slaughter upon *accidental meeting or occasional rencounter*, and proceeding *ex calore iracundiæ*, on *provocation and assault* by the person slain ; which circumstances are reported to his Majesty as reasons for a pardon. The terms too, which are made use of throughout this paper, are plainly the same in substance as that of *casual*, which occurs in the statute 1661.

WHETHER decisive or not of the true meaning of the Legislature, these remarks are at least sufficient to show, that the enactment is in some measure doubtful and obscure. And happily this seems to be all that is requisite, for preserving this important doctrine to us, as a part of our law.

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Being grounded in the highest reason and humanity ; being confirmed by the practice of the most enlightened nations ; and having of old been established in our custom, and acknowledged by our statutes, in an efficacious and substantial form ; it could not therefore cease to be law, unless in virtue of a statute which abolished the distinction for the future, in clear and unambiguous terms. Applied to a matter of this sort, it is a fair rule of construction, that the failure to express and declare, is the same as the want of purpose. And as long as they have it in their power, our Judges will properly refuse to believe, that the Legislature entertained an intention which is plainly barbarous and unjust.

Construction of
Act 1661 in
Practice.

WHETHER long and uniform practice, constructive of the statute in the unfavourable sense, would have been sufficient to decide this controversy, and to bind our Courts to so rigorous a rule of judgment, is quite another question, and one in which there is happily no occasion to engage. Because in truth, the practice proved to be just that fluctuating and discordant practice, which is suitable to the ambiguity of the statute, and might naturally be expected to result from it. Certainly, instances can be produced of libel found relevant to infer the pains of death, and even of the pains of death inflicted, in cases where gross provocation was proved to have been given. Such among others is the case of George Cumin, and more especially that of Carnegie of Finhaven ; where the defence of a continued train of provocation by rude behaviour, and injurious words and gestures, and these followed with an assault on the person of the pannel, by throwing him violently down into a deep and offensive puddle, was found insufficient to protect him from the ordinary pains of law, as for a murder, But the

Nov. 6. 1695.

Aug. 1728.

HOMICIDE.

the issue was that the assize, unable to reconcile this opinion of the Court in point of law to their own feelings of humanity and justice on the case, found a general verdict of *not guilty* for the pannel; who was in consequence dismissed without even a censure of his fault.

ON the other side, it is no less true, that instances, can be shown, equal at least in number, and more than necessary to keep the construction of the statute open, of arbitrary punishment applied to situations, where yet there was no just pretence of either a pure accidental slaughter, or of danger to the life of the killer. The defence of previous assault and beating, was sustained to liberate from the ordinary pains in the case of Alexander Maxwell and others; at the same time that the defence of actual danger to the life was found relevant *simpliciter* to assilzie¹. Another very apposite, and indeed invincible case, is that of Ensign Hardie; in which, after having repelled certain allegations of real injury, when pleaded to the effect of self-defence, the Court sustained the same facts as an aggression, to restrict the libel to an arbitrary

Nov. 3. & 7.
1690.

June 9. & 16.
1701.

¹ " Finds that part of the libel raised by Alexander Maxwell, and the other pannels with him, and the defence founded thereon, viz. That there was previous combination, whereupon followed the convocation libelled, to debar and keep out Mr Walter Macgill, the minister, from entering into his church that Sunday, and when they were required to disperse, instead of doing thereof, they took the keys from the bedall, and beat the nottar and the minister's wife, and others, before the slaughter, mutilation, or wounding was committed, relevant to restrict the slaughter to an arbitrary pain; but find, if the minister's life was assaulted, or any actual attempt by throwing great stones at him before committing the slaughter libelled, the same is a defence sufficient to liberate from the slaughter and other crimes libelled, *simpliciter*."

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Mar. 1. 1710.

Construction of
Act 1661 in
Practice.Nov. 19. and
Dec. 7. 11.
1733.

trary pain¹. Some years after, even a less violent injury, by struggling with the pannel to take his carabine from him, was found relevant to the same effect, in the case of Peter Maclean.

THERE could not in these instances be any doubt of the mortal purpose; as the homicide was done with the proper weapons of slaughter. And after them, though not of the same description in that particular, may properly be subjoined the case of John Christie; where the manner of the homicide is described to have been by throwing the deceased to the ground, and dispatching him, while in that situation, with repeated blows of a big stone, large stick, or other mortal weapon, upon the head and other parts of the body, whereby his skull was fractured, and death ensued². This was an assault of that sort, from

¹ “ The Lords sustain these defences proponed for the pannel, *viz.* That the defunct was the first aggressor, and did take hold of the pannel’s horse bridle, and when he was holding the horse by the bridle, did give the pannel a stroak over the face with a rung or tree, and wounded him to the effusion of his blood, and that the defunct beat the pannel from his horse, *conjunctim* relevant to restrict the libel to an arbitrary punishment; but found the reply made by the pursuers, that the pannel beat the defunct on the face with a thrown road, before he struck the pannel with the rung or tree, relevant to elide the foresaid defence, *simpliciter*.”

² “ And the said deceased George Crookbone, as became him, endeavouring to restrain your violence upon his said brother, and to prevent any further fighting or quarrelling with you, who having a big stone or large stick, or some other mortal weapon in your hands, and having tript or thrown down upon the ground the said deceased George Crookbone; at least, while the said deceased George Crookbone was lying on the ground, and was in no condition, either to offend you, or to defend himself; you did with the said stone or weapon, most barbarously, inhumanly and feloniously, beat, knock and bruise him upon the head, and sundry other parts of his body, while he was crying out *be* “ was

HOMICIDE.

from which no inference could arise on the face of the charge, in favour of the pannel, that he did not intend to kill. The libel was therefore found relevant to infer the pains of law, and a proof at large was allowed the pannel of all matters tending to alleviate or exculpate. The verdict was thus: "Find it proven, that at the time libelled " the deceased George Crookbone received a stroak on his " head, with a stone from the pannel John Christie, of which " he died; and find it likewise proven, that the pannel was " drunk, and was first attacked by Thomas Crookbone, brother to the defunct George Crookbone, in which scuffle " the defunct engaging, received from the pannel the wound " of which he died." Now what is here found in favour of the pannel, neither amounts to self-defence, nor is repugnant to the notion of a mortal purpose. Yet his sentence was only for transportation; which indeed, upon the footing of an unintentional slaughter, would have been too severe¹.

LAST

" was gone, wherethrough he received a mortal wound or fracture of the bones " in his head, and lay upon the streets till he was lifted up, and assisted to walk " to the house of ———, being all over blood, where he remained " speechless, till he died about eight o'clock, or some other hour of the morning of that day."

¹ If the Court looked into the proof for explanation of the general terms, used in the interlocutor, they would find still less reason to believe the pannel free of malice. For the fact as proved was, that the deceased, when lying on the ground with his hat off, was repeatedly struck on the head by the pannel, lying above or standing over him, and with a stone clenched in his hand, which he had stooped to take up, when the pannel fell.

In the trial of Thomas Roy at Aberdeen, September 17. 1759, the verdict found, " That the said Thomas Roy did, time and place libelled, with a stone, " hit the said John Murray in the head, of which blow the said John Murray thereafter died; but also found alleviating circumstances proven." This case was referred for the opinion of all the Judges; but the decision was prevented by a pardon. See the Record, June 24. 1760.

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Construction of
Act 1661 in
Practice.
Oct. 19. and
Nov. 12. 15.
1731.

LAST of all, I shall cite the case of James Christie. The pannel had stabbed with a sword, but excused the deed on this ground, that he had found the deceased in the act of adultery with his wife, and sacrificed him to his resentment on the spot. This defence, the Court justly found relevant to restrict the libel to an arbitrary pain¹. Yet, how reasonable soever this judgment, what other view can be taken of such a case, than as a case of homicide on high provocation? And though the provocation be high, yet is it in some respects not so favourable to the pannel as that of other injuries; because the homicide is here done on the pure principle of rage and revenge, unaccompanied with that fear of farther violence, or that personal confusion and alarm, which, in the ordinary case of assault on the body, concur with the resentment, and materially strengthen the defence.

Culpable Homicide on Provocation now Part of the Law.

WHILE such was the fluctuating and discordant state of practice, in the construction of the statute 1661, no conclusive argument could well be reared upon that law, being conceived in so equivocal terms, to exclude those strong considerations of reason, humanity, and the example of other nations, which all unite towards the allowance of this important distinction. Of late years, the opinion of the Court has been more favourable to the reception of it; and the term *culpable homicide*, as signifying slaughter on great provocation, and punishable at the discretion of the Judge, seems to be fast gaining an establishment as a proper phrase of style, in libels, interlocutors, and verdicts.

I

¹ " But for restricting the murder libelled to an arbitrary punishment, sustain this defence relevant, that the pannel killed the defunct, while he was in the act of adultery with the pannel's wife, and repel all the other defences." The jury found the libel not proven.

I REFER the reader to the following cases, in evidence of this improvement of our practice. First the case of Richard Firmin and Allan Macfarlane, who were charged with the murder of Kennedy, by shooting him with a musquet. At calling, the Lord Advocate restricted his libel to a charge of culpable homicide; and in these terms, though bearing a narrative which left no doubt of the mortal purpose, it was sustained by the Court to infer an arbitrary punishment. There was formerly occasion to mention, that the pannels, having acted in their duty, had a general verdict in their favour.

HOMICIDE.
Cases of Homicide on Provocation.
Feb. 4. 1788.

SECONDLY, The case of George White, August 4. 1788. The charge against him was alternative, as for murder or culpable homicide; and the narrative of the libel was, that he had killed the deceased by first striking him on the head with a candlestick, which beat him to the ground, and afterwards on the same part with a bottle, which cut and wounded him; so that he died of the consequences. The charge of murder was found relevant to infer the pains of law, and the other charge to infer an arbitrary punishment. He was convicted of culpable homicide only; and had sentence to pay a fine of 100 merks, and to be imprisoned for eight months.

THIRDLY, The case of James M'Ghie, Jan. 17. 1791; who killed the deceased by striking him on the head, with a pair of heavy iron tongs, while lying on the ground. In this case also the charge was alternative; and the pannel pleaded in defence, the provocation and alarm of a violent assault made by the deceased on his father in his presence, by throwing him to the ground, and severely beating him when in that situation. The libel was found relevant, generally, to infer the pains of law. He was convicted of

3 B

culpable

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culpable homicide, and had sentence of banishment from Scotland for seven years.

IN the circuit-courts also, of late years, many charges and convictions of culpable homicide have been the grounds of sentence; though in cases where the manner of the assault did not give any reason to presume, that the pannel was not actuated by a mortal or highly outrageous purpose.

Requisite Degree of Provocation.

BUT though the distinction of murder and homicide on provocation has thus at length become a part of our law, as of that of England; it is not however to be imagined, that it is therefore established in the precise same terms in both, or that our practice has adopted the opinions of the English lawyers with respect to the kind or degree of provocation, which will save from the ordinary pains. On the contrary, there is in this article a great and substantial difference between our system and theirs. Thus far the two coincide, that no provocation of words, the most foul and abusive, nor of signs and gestures, how contemptuous or derisive soever, is of sufficient weight in the scale, materially to alleviate the guilt; so that if John, upon words or signs of reproach by James, straightway take up a knife and stab him, or a heavy hammer and beat out his brains, he shall be judged a murderer, and die. In this also their doctrine agrees, that they make no account of provocation by trespass on lands or goods, if not accompanied with violence to the person; whereby, if John find James breaking down his fence, or entering his inclosure to search for game without his leave, or pasturing cattle on his grounds, or poinding John's cattle when they are upon John's own property; in none of these cases is it any thing less than murder, if John shall be so far transported with rage at this trivial and reparable offence,

as

as to knock the trespasser on the head. In this all the English authorities are agreed¹; and certainly for reasons so obvious and convincing as admit of no reply.

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BUT it is farther the sentiment of several, and among the ablest of their writers on law, that *any* assault on the person of the killer sufficiently extenuates his guilt, to lower the case to manslaughter; though the injury be nothing more than a single blow with the hand, or twisting the nose, or a fillip on the forehead, or jostling in the street, or whipping the person's horse out of the track². Farther; it is the concurring doctrine of all their books, that where on a sudden quarrel, parties fight upon the spot with mortal weapons, and on equal terms, (each giving the other time to draw and be on his guard); or even if in heat of blood they fetch their weapons, and go to the field and fight; there also the deed comes under the notion of manslaughter only³: and this without any regard to the first provocation, whether it be verbal or real, or from which of the parties it come.

Requisite Degree of Provocation.

Now, in all these articles, our practice is formed upon quite another plan. To have a good plea of extenuation, the pannel, at the time of killing, must have stood in the situation of an assaulted and injured person; one who was in a manner constrained to strike by the violence which he

Requisite Degree of Provocation.

3 B 2

was

¹ Foster, p. 290. 291.; Hale, vol. i. p. 455. 456.; Hawkins, b. 1. c. 31. No. 27. No. 33.; Blackstone, vol. iv. p. 200.

² Hale, p. 455. 456.; Hawkins, b. 1. c. 31. No. 36.; Blackstone, vol. iv. p. 191.

³ Foster, p. 295. No. 3. p. 297. No. 5.; Hawkins, vol. i. c. 31. No. 28. 29. and 34.; Blackstone, vol. iv. p. 191.

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Case of Fair
Combat in Heat
of Blood.

June 17. 1670.
June 11. 1678.

June 4. 1667.

Nov. 9. & 16.
1674.

was suffering from the deceased. If in any degree the mortal strife was matter of convention between the parties, though but tacitly, and taken up at the moment; if the mortal blow was not the impulse of instant pain and agitation, but of a purpose to fight as on a certain plan and set of principles; this, according to our notions, is murder in the survivor. In which point of view, the circumstance of waiting, till the other party draw and be on his guard; that favourable circumstance which makes it manslaughter by the law of England; would not with us be of any advantage to the panel, as shewing plain deliberation, presence of mind, and method in his revenge. This, our rule, is proved by the two cases formerly related, of James Murray and James Gray, both of them cases of fair combat in heat of blood and on a recent quarrel. To which may be added (though with respect to the sufficiency of the evidence, the verdict has been thought questionable), the case of William Douglas, for the slaughter of Home of Eccles, which was shortly thus: That these persons along with others, had quarrelled when at dinner in a tavern, and having taken coach instantly drove to the adjacent fields, where they set to confusedly with swords; two against two; and Home was killed, as was alleged (and indeed I think is proved), by Douglas. The same principle seems to have ruled in the case of Andrew Rutherford, indicted for the murder of James Douglas. This slaughter had taken place on a sudden quarrel, of which it could not be said on the proof who was the author, or who had been the first to draw: only the parties were seen by persons at some distance to alight from their horses and thrust at each other, neither of them, as far as appeared, taking undue advantage, or giving back or declining the combat. The jury found the slaughter proved, and the self-defence

defence not proved. And the Court, who by their interlocutor had previously required it of the pannel to bring proof of self-defence, gave sentence of death.

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WITH us too, though not always a decisive, it is generally an unfavourable circumstance for the pannel in this question, that he has struck the first blow. If John strike James a blow with the hand, and James return it with severe blows of a staff, on which John, being hurt and irritated, draws, but gives James time to do the like, and thus they fight and James is killed, this is murder by the Scottish practice; however such a case might be resolved in the courts of England. We cannot make the same allowance for his being provoked, who is only in a situation to be so by his own intemperate and unlawful act, and has shewn an absolute disregard of those very emotions in his neighbour, which he would have excused in his own case. His assault of his neighbour's person justified the return of blows; and, though there be excess, he cannot therefore be either justifiable or excusable to resent these, (while they do not put his life in danger), unto the death of his neighbour. This rule is pointedly announced in the interlocutor on the case of Ensign Hardie, where it is sustained to restrict the libel to an arbitrary pain, that the deceased was the first aggressor, and had laid hold of the horse's bridle, and struck Hardie on the face with a rung or tree: but this passage immediately follows; "But find the *reply* made by the pursuers, that the pannel beat the defunct on the face with a thravn rod before he struck the pannel with the rung or tree, relevant to elide the foresaid defence *simpliciter*."

June 9. 1701.

THE difference is still more remarkable with regard to the degree of injury and provocation, which will be received in

Requisite Degree of Provocation.

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Sept. 8. & 9.
1693.

in our Courts to extenuate the guilt. That any even gross indignity is sufficient, or any assault on the person of so slight a nature as those which are mentioned in the English books of law; this it would be contrary to the whole tenor of our records to believe. Suffice it to mention upon this head, (since the invariable course of judgment makes it needless to accumulate authorities), the case of William Aird, for the murder of Agnes Bayne, by throwing her backwards down stairs. The allegation was here repelled, of her having provoked him by tossing the contents of a chamber-pot in his face¹. In short, it is to be understood, that it does not come up to the due description of the defence by our law, that the pannel is in rage and heat of blood, though owing to some improper freedom which the deceased has taken with his person: This passion must be occasioned by some adequate and serious cause, some severe and continued assault, such as carries agitation and alarm with it, a dread of farther harm and injury, as well as present smart and pain of body; whereby the sufferer is *excusable* in the loss of his presence of mind, and excess of the just measure of retaliation. Excepting the peculiar case of slaughter committed on the adulterer discovered in the fact, I am acquainted with no case of culpable homicide in our record, which is not more or less of this description; not a case of passion only, but of passion excited by bodily suffering, and mingled with terror, and with perturbation of spirits. And truly it may be doubted, whether in this our rule is not wiser and more salutary, at least more suitable to the fervent temper of the Scottish people, than that of the neighbouring

¹ In the case of Joseph Hume, February 26. 1732, a defence of jostling and verbal abuse was once made, but almost immediately abandoned.

bouring kingdom, which excuses the mortal revenge of such inconsiderable wrongs. To curb and repress an over-jealous, choleric, or quarrelsome humour, as far as can be done without injustice in the particular case, and thus to bend the temper to the course of civil order, is the main scope of law in this whole department of offences against the person. And this object seems to be duly kept in view in our practice, when it has consideration of human infirmity in those difficult and agitating situations only, which require a more than ordinary strength of mind, and command of temper to withstand them; not in those, where the pride more than the body of the man has been offended.

HOWEVER this may be, upon which it would not become the lawyers of either country to express themselves with confidence, clear it is, that such is our fixed and certain rule.

AND here I shall take occasion to observe touching the noted case of Mungo Campbell, though certainly a case of difficulty, and well deserving of that deliberate attention which it received, that it was judged in strict conformity to the whole series of precedents, either of an ancient or a modern date, that are to be found upon record. On the whole circumstances of the situation, even those of the Judges who were most favourable to the pannel, and along with them the jury had been of opinion, that the injury to his person was not of that degree, nor had been prosecuted to that length¹, which could excuse his passion, or extenuate the guilt; so that the deed was rather to be held a wilful and resentful.

Case of Mungo
Campbell.
Dec. 1769.
Jan. 1770.

¹ See Notes of the opinions of the Judges in this case, in Maclaurin's Criminals.

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resentful deed, the fruit of the habit of mind, the proud and jealous temper of the man, who acted deliberately on the occasion, than of excusable perturbation and terror, or immediate distress of body. If, in prosecution of his unlawful purpose, Lord Eglinton had advanced on Campbell, and had laid hold of the piece; and thus a personal struggle had ensued, in which Campbell, defending his property, (and certainly he was not obliged to quit it), had been beaten and overpowered, or injured in his body, before discharging his piece; this would have been a far more favourable case, and indeed, in my mind, hardly distinguishable from that already mentioned, of Maclean, in 1710, where an assault on a person, to take his carabine from him, was found relevant to restrict the libel to an arbitrary pain. For this would not have been a situation of simple trespass on goods, but of trespass necessarily coupled to assault of the person. But taking all the particulars of this unfortunate story; it could scarcely be said that Campbell had been at all assaulted, or had any reasonable or well grounded apprehension of future harm to his person. Certainly, at the time of discharging his piece, any provocation he had yet received was not higher than if he had been jostled in passing, or pulled by the nose, or kicked on the breech; no one of which indignities, according to any authority or precedent that can be produced in the law of Scotland, would have been sufficient to excuse him. In fine, he had shewn nothing of that forbearance, that phlegm and tardiness of blood, which, according to the course of our practice, is a necessary accompaniment of this plea, but rather a choleric and jealous disposition hastily to lay hold of the first opportunity of offence, for the purpose of revenge.

FROM

FROM what has now been said, with regard to the degree of injury which will extenuate the guilt of slaughter, there results an important, but it should seem an unavoidable consequence, touching the construction of that slaughter, which is committed in resistance of defective and irregular warrants, or warrants executed in an irregular way. A messenger by mistake arrests John, instead of James; or on a warrant against John, he arrests that person, who knows him not, without saying who or what he is; or he arrests John on a warrant which bears an erroneous description of him, or is otherwise not in due form of law. In some of these cases the prisoner suffers a degree of provocation at the time; and it may be said, that in all of them there is a wrong or trespass on the part of the officer, who ought to see that his warrant is good, and should proceed lawfully in the execution of it. But to hold, which seems to be the rule in the neighbouring kingdom, that it is such a wrong as will excuse the party thus molested, if on mention of the mistake, and in some instances even without that warning, he straightway kill the officer with a mortal weapon, and though no personal harm have yet ensued¹; this is far from being in the disposition or analogy of the law of Scotland. Very suitable it may be to the rest of the English practice, which holds

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Provocation by Execution of irregular Warrants.

3 C

that

¹ Foster, p. 312. No. 9.; Hawkins, vol. i. p. 83. No. 36. p. 87. No. 56. 57. 58.; Hale, vol. i. p. 457. 458. 470.

See also the case of Mary Adey, (Leach's Cases, No. 99.) who stabbed a constable's assistant, in defence of a man with whom she cohabited, and whom the constable meant to apprehend under a statute, as an idle and disorderly person. The constable had not even touched his person, but had entered his room without violence, and told the man that he must come along with him; which the assistant repeated. On this the woman instantly stabbed the assistant in the side. The jury

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that a pull by the nose, or a fillip on the forehead, (injuries not more material than a rude invasion of a person's liberty), is a provocation to extenuate the guilt. But as suitable as such a rule is to their practice, as unsuitable it would be to ours, which is quite a stranger to any plea of extenuation grounded on such trivial offences, and requires a proof of bodily distress and agitation of spirits in the case of assault by any ordinary man, and much more will require it in the case of an officer of the law; who may indeed be in the wrong, or fall into an error, but has commonly some colour of excuse, and opinion of duty, more or less, for what he doth. Though he do err, still he is not divested of his character of servant of the law, which is itself entitled to regard; as well as in all cases where he is known to be acting in that capacity, the motive, scope, and extent of his purpose, are at the same time evident to the party; so that by compliance, which is here a safe measure, all fear of farther violence shall at once be at end: Not to mention the more certain means of redress of the wrong, and punishment of the offender, which the person aggrieved enjoys in all cases of this description. If therefore, instead of submitting for the time, as any man of a well regulated mind would be disposed to, he shall take advantage of the mistake, straightway to stab or shoot the officer, before any great struggle has ensued, or any grievous harm of body been sustained by him; certainly, in consistency with the rest of our law, he cannot be found guilty of any lower crime than murder.

PUT

jury found these facts, and that the man was not an object of the statute. The case was referred for the opinion of the twelve Judges; which was never publicly given. But the woman, after lying 18 months in gaol, was discharged.

PUT the case, that a Sheriff's officer having warrant against a criminal, has ignorantly followed him beyond the bounds of the sherrifdom; and having overtaken, has laid hold of him by the collar of the coat, to keep him, but without striking, or offering other violence to his person. If in this situation the prisoner draw a knife and stab the officer, he can neither be justified nor excused. Because even between man and man, and supposing the one party not to be an officer of the law, nor the other a felon, this purpose of detention, and executed in so moderate a way, is not a wrong of that degree, which would at all extenuate the guilt of slaughter. And surely if it is not more, the case is at least not less favourable to the officer, on account of these circumstances in the relative situation of the parties. If a struggle and beating ensue on the attempt, it will depend on the degree of violence, as in other cases, whether this will bring down the charge to culpable homicide. Or if the officer, being resisted, strike the felon so as to put him in danger of his life; still, to be completely *justified*, the felon must observe the *moderamen inculpatae tutelæ* in his defence: for so he must have done on occasion even of a causeless and malicious quarrel, fastened on him by any one of the people, without pretence of warrant, or opinion of duty, to support him. On the whole, there seems to be the highest equity and reason in considering the hard situation of an officer of the law, to whom the defect of his warrant may often be utterly impossible to be known, and who as often cannot judge of the defect, and is obliged by his duty to proceed in the execution of it; and yet according to the supposed doctrine of the law of England, may be killed with impunity by a ruffian, equally ignorant of that defect as the officer, and

HOMICIDE.

Provocation by Execution of a vitious Warrant, &c.

CHAP. VI.

Jan. 5. and
Feb. 1. 2. & 4.
1796.

who is only actuated at the time by malignity and brutal rage.

THE chief illustration of this doctrine is the late case of John and Arthur O'Neal. These pannels were father and son; and a warrant had been issued against them, as idle and disorderly persons, to apprehend, and bring them for examination, in order to their being adjudged as soldiers, under a statute which gave powers to that effect. The men were known to be resolute, and to have a purpose of resisting the warrant, which had come to their knowledge; and a party of soldiers was therefore sent with the constable, to support him in his office. On their arrival at the house, and after notification of their business to those within, but before any attempt to break open the door, three shot were immediately fired at the party, (indeed it was proved that they had provided shot and loaded their guns, on purpose to resist); and shortly after three shot more were fired; whereby one man was killed, and several were wounded. In charging the jury (for it was not pleaded to the Court on the relevancy), the pannels counsel took two exceptions to the warrant, as not within the terms of the statute; *1st*, That it was not under the seal as well as the hand of the magistrates, (which no Scots warrant is); and, *2^{dly}*, That the warrant bore a blank day of examination, instead of the next lawful day of meeting, according to the direction of the act. But the Lord Justice-Clerk, to whom it fell to address the jury before inclosing, and who alone of all the Judges had an opportunity of speaking on this objection, was very explicit in his opinion, that these circumstances, which were utterly unknown at the time of the slaughter, were no extenuation of the guilt. The jury found the father guilty, and he had sentence of death. He afterwards received a pardon;

pardon; but on what grounds has not been communicated to the public. HOMICIDE.

AFTER these circumstances of difference in the practice of the two countries, I shall now take notice of one article of doctrine in which they are agreed. This is in excluding the defence, in any case where, on the whole circumstances of his behaviour, the pannel shall appear to have acted deliberately, and to have been master of his emotions. If the husband find the adulterer in the act, and kill him on the spot, he is excusable for this transport of sudden rage on such an injury: but if he confine him till next day, and then kill him, or if he force him to swallow a dose of poison, or if he castrate him, and the person die of the operation; in all these cases he has lost the privilege which is allowed to human infirmity. In like manner, a schoolmaster; if instead of instant correction in the usual way, he shall send for some extraordinary instrument of torture, or shall bind his pupil neck and heel, and scourge him in that posture, or shall lock him up for an hour, and then scourge him so that he dies; he cannot pretend to have been actuated by the due motives as a preceptor, and shall answer it like any other man. For all these are acts of deliberate and inventive cruelty, on a principle of revenge; which is always murder¹.

No Excuse if the killing be deliberate.

In the close of all, I shall venture to observe, that as with regard to the degree of provocation which makes a case of culpable homicide, so also with regard to the judgment which may competently pass on the offender, it may deserve to be considered, whether our law is not upon as salutary a footing as that of England. For our Judges have

¹ Foster, p. 296. 7.; Hale, vol. i. p. 453-4.; Hawkins, vol. i. p. 81. No. 23.

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have a discretion in this matter, to condemn the manslayer to such a punishment, according to the measure of his fault, which shall truly serve as a correction to him, and a warning to others. Whereas, in England, the judgment is one invariable thing, the forfeiture of moveables, and burning in the hand; which is very unequal in its application to the different conditions of life, and if carried into effect, may be either too severe or too lenient a course; but as sometimes managed, by gift of the forfeiture to the offender himself, becomes no punishment at all. But I find that I am now venturing out of my proper sphere.

Murder; what
its Characteris-
tic.

VI. To proceed, therefore, with our subject. I shall now examine the third degree of homicide, the crime of WILFUL MURDER, for which the laws of all civilized nations, herein conform to the Divine law, admit of no atonement, but with the offender's life.

THE characteristic of this sort of homicide is, that it is done wilfully, and out of malice afore-thought. But these terms are not here to be received in their restricted and most obvious sense, of a rooted and special enmity to the deceased, but only in the larger and more general sense of *dole*, or a wicked and mischievous purpose, and as contradistinguished to those motives of necessity, duty, or allowable infirmity, which may serve to justify or to excuse the deed.

Must the Malice
be special, or
prior to Meet-
ing.

How far this construction will hold against the panel, in the case of a mortal purpose not particularly directed against the individual who has perished, was illustrated formerly, in the general title of Crimes, and shall not now be resumed. But farther, where the malice is special; as little does it lie with the prosecutor, to assign or prove any probable

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probable cause to which it may be ascribed, or to shew that it has been of long endurance, or even prior to the fatal meeting of the parties. The more strange and unaccountable such malignity, the deeper is the guilt of the deed; and how recent soever the occasion of it, if it precede and be the motive of the mortal blow, "*si antecedit ictum licet non congressum,*" the crime is murder, and the pannel's life shall be forfeited for that which he has thus unnecessarily, and without provocation, destroyed. The malice is implied in the act itself of intentional killing, which is the highest possible injury, and naturally carries with it the presumption of *malus animus*; which it therefore lies on the pannel to overcome by proof made on his part, of some of those circumstances of necessity, or excusable infirmity, in which he may have a defence. "*Non enim* (says Mathæus¹), "*eam defensionem proposuisse satis est, nisi eadem idoneis argumentis probetur. In dubio enim cædes sicut quævis injuria presumitur dolo malo facta.*" The commentator has justly said, *sicut quævis injuria*; for we are not here taking up any strained or peculiar rule, out of aversion only to blood, and in order the better to repress so high a crime, but just the plain and ordinary rule, which equally applies to any other violence that is committed on the person.

IN

¹ In Tit. de Sicariis, Chap. 3. No. 14.

In the trial of Andrew Rutherford, November 9. 10. 12. 1674, "The Lords find the lybell relevant, as likewise the pannell's defence of self-defence, and that the pannell ought to prove the same, and remits both to the knowledge of an assize." The jury found the slaughter proved, and the self-defence not. The pannel had sentence of death. He had pled that self-defence should be presumed, unless it were proved, that he was the aggressor. The parties here were seen thrusting at each other by persons at a distance; and who was the provoker, or who drew first, did not appear from the proof.

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Sufficient, if
Malice taken up
on the Spot.
June 10. & 11.
1678.

IN particular, this was very expressly declared to be law in the case of James Gray, where the libel bore a narrative of deadly hatred; in respect of which it was pleaded that the prosecutor, *in this case*, must prove that quality of his charge. The Court found, that no such proof could be required of him¹. The like defence was over-ruled in the case of William Aird, September 8. 1693²; of George Cumming, November 11. 20. 1695³; and of Lindsay and Brock, July 29. and November 15. 1717; as in many other cases of a prior date, which it were tedious to recite. On the same ground relevancy was sustained in these later cases; that of David Pretis, January 19. 26. and February 2. 1730; Robert Brown, January 19. 26. 1730; Matthew Randal, July 6. 7. 1730; George Donald, August 4. 11. 1730; in the two first of which, the libel was entirely silent as to the cause of hatred, or occasion of quarrel, and in the other two only made mention of some very trivial interference at the moment of the slaughter. These four pannels were all convicted and executed.

Must the Libel
bear Malice.

As there is thus no need of any proof on the prosecutor's part, but of the bare act of violently killing, accompanied

1 "The Lords find the libel relevant, and that there is no necessity of any distinct probation for proving of premeditated malice, and remits the libel to an assize."

2 "Find the indictment relevant, and remits the same to the knowledge of an assize, and repels the defences and duplies made for the pannels."

3 "Finds the indictment as it is libelled, relevant to infer the pains libelled, and repels the defence as reformed, and the hail other defences proposed for the pannel."

panied with a purpose so to do, so neither is it indispensable to the charge, that it proceed on the narrative of deadly malice and hatred conceived to the deceased. If it bear the crime of murder in the *major* proposition, and say in the *minor* that the pannel, at such a time and place, did murder, or did cruelly kill and slay the deceased, by such and such acts of great violence, these terms are themselves an implied charge of the sort of malice which the law requires; how strange and unaccountable soever it may seem in the circumstances of the case, that the pannel should have been actuated by any such evil passion. A charge of this sort was sustained against Alexander Robertson, January 1. 1679; against Richard Carse, June 10. and 17. 1700; and on full debate, in the case of William Ross, February 9. and 16. 1719¹. It was again sustained in the case of Henry Hawkins², July 17. 1769; of James Baillie, December 16. 1771; and of Brown and Wilson, June 28. 1773; and of George White, August 4. 1788; and in some of these instances after debate on the objection. In addition to this list, which might be swelled to a great bulk, notice may also be taken of an entire class of cases, in which I do not observe that any charge of malice has ever been made; I mean cases of child-murder. The reason is, that the infant or-

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¹ "In so far as, upon the, &c. he did kill and murder John Allardyce, periwig-maker in Edinburgh, in his own house in Blackfriars Wynd in Edinburgh, or in the stair leading to it, by giving him a wound with a sword in the body."

² "That whereas by the law of this and every well governed realm, murder, or the bereaving an innocent man of his life, is a great crime, and severely punishable;" and then it proceeds to relate, that a squabble having arisen at the guard-house between him and the deceased, "he did with a screwed bayonet feloniously stab the deceased."

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dinarily is destroyed at the very moment of the birth, and before, in any proper sense, it can be the object of the mother's hatred. It may farther be remarked, that while the fashion of special interlocutors of relevancy continued, this of hatred born the deceased, though often stated in the libel, is one of those articles which the interlocutor never repeated, nor required to be proved. Thus, on the whole, the malice which the law requires in this particular, turns out to be no more than this;—a depraved and wicked disposition; a heart regardless of duty or humanity; which is to be gathered from the whole circumstances of the case, as they are shown in evidence.

*Animus occiden-
di, how far es-
sential.*

THIS will more plainly appear, if it be considered, that even the *animus occidendi*, the purpose to deprive the deceased of life, is not essential to the charge of murder; that is to say, in the most obvious sense of the phrase, and that in which it is ordinarily understood. If indeed the pannel bring a proof of such circumstances in exculpation, or can point out such in the manner of the assault which is related in the libel, as are repugnant to the very notion of a mortal purpose, and show that the slaughter fell out in an improbable and unexpected manner, and in the prosecution of some inferior and not outrageous object; certainly this will have its due effect of restricting the charge to an arbitrary pain. This matter was formerly illustrated, in the case of death taking place on a single blow with the hand, or on a fall, occasioned by a push or jostling. Of the same character also are such cases as these: If the pannel, having a drawn sword in his hand, throw it away and betake himself to a staff; or if having a loaded pistol, he fire it off in the air and strike with the but; unless these favourable circumstances, which yield probable evidence

vidence of a purpose to chastise only, shall be outweighed by after excess in the use of those instruments, or by other incidents in the progress of the contest.

HOMICIDE.

BUT, with the exception of cases of this description, our practice, which in this is the same as that of England¹, does not distinguish between an absolute purpose to kill, and the purpose to do any excessive and grievous injury to the person. So that if the pannel assaulted the deceased meaning to hamstring him, or to cut out his tongue, or to break his bones, or to beat him severely, (or, as it is vulgarly expressed, to beat him within an inch of his life), and in the prosecution of this outrageous purpose has actually destroyed his victim, he shall equally die for it, as if he had run him through the body with a sword. And the reasons are obvious and satisfactory, why no other judgment can pass on such a case. Because to observe any other rule, would be to secure an indemnity to all but those, comparatively rare, cases of murder, which are done with the peculiar instruments of slaughter. Because, in committing any such flagrant outrage on the body, the pannel shews an utter contempt of the safety, distress, and existence of his neighbour, and if not a determination to kill him, at least an absolute indifference about the consequence to him, whether he live or die. And because, from the very excess of the injury, the case does not admit any clear or conclusive proof on the part of the pannel, that at the moment of killing he did not mean the thing to follow, which actually happened. In great injuries and violences there is no wounding by rule, so as with cer-

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¹ Hale, vol. i. p. 454. 472.; Hawkins, vol. i. p. 74. No. 10. p. 83. No. 38.; Foster, p. 291. No. 2.; Blackstone, vol. iv. p. 199.

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tainty not to kill. Neither is there in nature any precise measure of the rage and mischievous feeling at such moments of furious action, by which even the actor himself can certainly tell, and much less can others discover, whether he meant to kill, or barely to leave life in the object of his revenge. If he answer truly with respect to his state of conscience on such an occasion, all that he can say will be, that he was transported with rage and hatred, and cared not what became of it, so he had his vengeance out. He must therefore be accountable for it as a murder; since knowing these things, he nevertheless resolved, that rather than forego his vengeance, or employ some inferior means, his neighbour should run this hazard of his life; so low was his regard of his neighbour's safety. Now this *corrupt disregard* of the person and existence of another, is precisely the dole or malice, the depraved and wicked purpose, which the law requires and is content with¹. It looks with a jealous eye upon every act that has destroyed a man; and wheresoever any one has been killed by the hand of his neighbour lifted in outrageous or continued violence against him, will presume that if not at first invaded, he was at least continued to be abused, out of growing rage and malignity, and with a purpose of doing that which in the end was done. In short, to have the benefit of the plea of culpable homicide, he must either point out such circumstances upon the face of the charge in the libel, or in the evidence brought in support of it, or he must bring such a proof on his own part, as shews that the mischief which he meant was of that inferior kind, from which, according to the common course of things,

¹ "Dolusum homicidium est, quod vel animo et proposito occidendi, vel solum vulnerandi voluntate committitur." Carp. Quæst. 27. n. 5.

things, not even any material danger of the person's life was to be dreaded.

HOMICIDE.

AMONG the many cases which might be appealed to in evidence of this just and necessary rule of practice, that which perhaps to most advantage illustrates it, is the case of Dougal Macfarlane, tried in November 1737. This man had quarrelled with John Woore, officer of excise at Crief, on occasion of something relative to his duty in the gauging of malt liquors, which belonged to the pannel's master. And having learned that he was to pass by a certain way under cloud of night, he solicited several persons, and prevailed with three of them, to go along with him, and lie in wait by the side of the way, (as he expressed it), "*to cuff the gauger.*" They went out accordingly, all of them provided with sticks only, though other weapons might easily have been procured. And having met with Woore, they pulled him to the ground from his horse, and there severely beat the poor man, on the head and sundry parts of the body, so that he remained upon the road insensible, and was next morning found dead. It appears that Macfarlane in particular, reproached one of the party for failing to use his stick, and having pulled it out of his hand, returned and beat Woore a second time, as he lay. The whole party, however, returned to the village where they resided, and had liquor there from Macfarlane's master and mistress, to whom he openly boasted of what he had done, saying, "*that he had cured the gauger of his gauging for a week.*" He slept too that night at home, and made no attempt to escape. These and other circumstances of the story were made use of to show, that the death of the man was not within the compass of their project; whence

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it was argued, that only an arbitrary punishment could be inflicted. But the answer was thought good, that the pannel had deliberately planned an excessive and outrageous injury to the person of the deceased; and as in the execution it had been prosecuted to the death of his victim, so in the nature of things it could not plainly appear, that at the moment of killing he did not truly mean to destroy: In the most favourable view, he was at least resolved on that which was to put the man in imminent danger of his life; and he must stand therefore to the issue of the hazard, which he had thus wickedly brought on his neighbour. The defences were repelled, and the beating, even without the way-laying, was found relevant to infer the highest pains. The fact was fully proved; and the pannel had sentence of death¹.

Animus occidendi, how far essential.

ANOTHER case of the same stamp, and which was decided on the same principle, is that of David Hume, tried in October 1723. This man, along with two more, of the name of Sinclair, had conceived a grudge against John Horsely and others, Englishmen, and servants of the York-buildings Company on their estate of Winton, who had reproved them for

¹ November 28. 1737. - "Find that Dougal Macfarlane pannel having time and place libelled way-laid the deceased J. Woore, officer of excise, and meeting with him, did, with a rung or large stick, beat him, whereby the said J. W. did soon thereafter die; or that he the said pannell did time and place foresaid, with repeated strokes of a rung or large stick, beat the said deceased J. W. to that degree that he did soon thereafter die thereof; or that time and place foresaid the said J. W. was killed in manner libelled, and that the pannell was art and part thereof, all *separatim* relevant to infer the pains of law; and repell the haill defences." It will be observed, that in the second member of this interlocutor, the beating is found relevant without the way-laying.

for passing through the inclosures without leave. They were heard, without much reserve, to threaten mischief to the *Englishmen*, and to say, that they should be for ever affronted, if they had not amends of them. One evening, in the dusk, they accordingly lay in wait, by a wall near the house of Seaton, and set upon and beat one of Horsely's servants, who had come out to draw water; and on his giving the alarm, and another coming out, they set upon and beat him also, with rungs and staves, in such a manner that he died. There was nothing in these circumstances to indicate a formed purpose of assassination: But the Court notwithstanding, as in the other case, found, "That David Home pannel having at the time and place libelled, beat or wounded George Sweet servant to John Horsely possessor of Seaton, of which strokes or wounds the said George Sweet did soon thereafter die, relevant to infer the pain of death, and confiscation of moveables." The pannel, however, was not convicted.

HOMICIDE.

Oct. 9. & 16.
1723.

I SHALL only take notice of one case more, an old case, and one of much malignity and cruelty, but in which the pannel cannot be said to have had an absolute purpose to destroy. I allude to the case of Patrick Stewart, who having conceived great malice at Angus Maciver, on suspicion of unlawful intercourse with his daughter, took possession of his person, bound him hand and foot, cut off his privy member, and put hot ashes in the *scrotum*, and then carried him on horseback to a house at some distance, where in a few days he died. Stewart was convicted and beheaded.

July 3. 1602.

Thus it appears, that it would be fruitless to set on foot an inquiry, in which however some commentators have employed much time and labour, concerning the nature of the several

Lethal Weapon,
if essential to
the Charge.

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several weapons, what are, and what are not to be reputed lethal. Thus far there is a difference in weapons, that there be some, such as swords and fire-arms, which carry absolute and uncontrollable evidence of the mortal purpose, in every case where they are used; and in this sense it may be not improper to distinguish these as lethal. But that there is any weapon of so harmless a kind, that in every case, and in all circumstances, it must be held to have been used without a mortal purpose; this is an absurdity in itself, and cannot be maintained without a plain perversion of the term. The answer is, that the weapon must be lethal, by which a man has died; that a man was actually killed with this weapon, in this case; and that whether it was or was not used with a mortal or highly injurious purpose, is a matter which cannot be determined on bare sight of the weapon, but on the way of using it, the repetition of the blows, the comparative age and strength of parties, the words uttered on the occasion, and all other particulars of the story. Wherein, if on the whole there be evidence of a mortal or very malignant purpose, the circumstance of an unlikely weapon may be outweighed, like any other. That weapon has actually killed; it might be intended so to do; and it must be shewn *idoneis argumentis*, on the part of the panel, that this was not the case. For this rule we may quote the Divine law, by which he who smites with a throwing stone, or with a hand-weapon of wood, wherewith a person may die, is to be held a murderer, and to be put to death. And again, still more explicitly, "if in enmity he smite him with his hand, that he die, he that smote him shall surely be put to death, for he is a murderer."

Numbers, c. 35.
ver. 16. 18. 21.

THE practice of Scotland has in all times been governed by these rational, and indeed necessary rules, without which men would enjoy a very imperfect protection of their lives. To mention a few instances, out of a great number which it were equally tedious as useless to recite. On the 10th November 1606, Patrick Deanes was condemned to die for the murder of his wife, and a child in her womb, done by striking her with his foot on the belly, and with a swingle-tree on the back; of which strokes she and the child immediately died. Libel was found relevant against Hugh Sommerville, for slaughter committed by several strokes given on the side, shoulders and belly, with a girth-sting, or strong baton; and against Matthew Culdie, for slaughter, by striking on the head with a flail; and against Ker in Edderstone, for killing by the stroke of a *kent* (or staff) on the head. In the case of Alexander Robertson, the charge was thus, "that he did invade and assault the deceased Alexander Falconar, his fellow soldier, and did most cruelly beat, wound, and bruise him in several places of his body, of the which strokes, wounds and bruises he languished, by the space of — hours, and thereafter died;" and on this charge the pannel had sentence of death. As had William Aird, on a charge to this effect: that he had assaulted Agnes Bayne, when standing at the entrance of her cellar, had repeatedly kicked her on the side, pushed her backwards down stairs, and having followed her into the cellar, there renewed the same sort of violence upon her as she lay; through which she fainted, fell into a cold sweat, and next day died. In this case it was farther pleaded for the pannel, who was a soldier, that he had a sword upon him, which he did not draw, nor make use of.

HOMICIDE.

Lethal Weapon,
if essential to the
Charge.

Dec. 1. 1613.

Jan. 10. 1616.

June 3. 1631.

Jan. 1. 1679.

Sept. 8. 1693.

CHAP. VI.

April 11. 1699.

NEARLY a-kin to this, was the case of William Graham, indicted for the murder of William Reid, his servant; having beaten him down with many strokes upon the steps of a stair, and there trodden upon him, to the discolouring and crushing of his body, and the effusion of his blood within him, so that he could hardly creep to his father's house; which having reached with much difficulty, he there lay, swooning and vomiting blood, daily, and almost hourly, until he expired, about three weeks after the time libelled. This charge went to trial, as relevant to infer the pains of death. But the pannel was not convicted. On the 17th June 1700, a libel was found relevant against Richard Carse, to infer the pains of death, of which the charge was thus: "You the said Richard Carse beat and wounded the said Thomas on the head or face, or elsewhere, of which beating and wounding, he fell ill, and languished two or three days, and in the wound, after he was dead, was found a long piece of stick¹, which was taken out from under his skull." In the case, likewise, of Burnet of Carlops, the libel went to trial, as for a capital pain, though the beating was with a cane and broomstaff, and by persons who had swords upon them; on which ground it was argued, that they could not have intended to kill². These persons

Jan. 8. & 29.
1711.

¹ It appears from the proof that the pannel had struck the deceased on the head with a wooden dish or *queich*, and that a splinter detached itself, and entered the skull at the eye, and broke off, short. The jury found a special verdict; but the pannel made his escape before sentence.

² The prosecutor answered, "Though the beating with one hand, or with a rod or staff, does presume that there was no intention to kill; but still there may be other circumstances, that are wholly inconsistent with the foresaid presumptions, and from which the *animus occidendi* may be as clearly inferred, as if a
" deadly

persons also were acquitted. But it was otherwise in the case of James Brown, who suffered death for the murder of a woman by striking her with the hand, and treading her under foot; and in the case of James Baillie, who had sentence of death for the murder of his wife, by beating her with the handle of a whip, tumbling her body down a steep bank, and again beating and kicking her, so that she died. As also, John Brown and James Wilson, were convicted and suffered death for the murder of Adam Thomson, done by beating him with an oak stick, and a potatoe dibble.

HOMICIDE.

July 28. and
Aug. 4. & 5.
1735.
Dec. 16. 1771.

June 28. 1773.

WHAT is stronger than any of these instances; libel was sustained, as formerly mentioned, against Malcolm Brown, miller in Lennox-mill, for killing a boy by a blow on the ear, with his fist¹. And more lately, in the case of William Lindsay,

Lethal Weapon,
if essential to
the Charge.
June 29. 1664.
Feb. 29. 1748.

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" deadly weapon had been made use of. For as it cannot be contraverted that
" one may beat to death, by repeated strokes or blows of such weapons as the
" law does not call deadly, so the *animus occidendi* is as necessary to be inferred
" where such a continued beating is qualified, as where a mortal weapon is made
" use of, and even may be justly said to have a degree of more malice in it, as it
" is not sudden, but of longer continuance, and consequently more malicious than
" the other."

Again, in answering certain decisions, he says, " In all of them it is evident,
" that that which happened was contrary to intention, and that there was no
" more but one single stroke given; whereas, in the present case, the repeated
" and continued strokes do take away the presumption naturally arising from the
" nature of the weapon."

¹ " Unde et ex lege Cornelia de fideiis merito dixeris teneri cum, qui cujus-
" cunque conditionis hominem, &c. . . . et quocunque instrumenti genere, dolo
" malo occidit, vel etiam sine ullo instrumento extrinsecus assumpto, dum vel
" pugnis vel capitis impetu aut calcibus ictis et conculcationibus, &c. . . . homi-
" cidium dolo malo factum probetur." Voet ad L. Corn. de fideiis, No. 1.

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we have an instance of the same judgment given on the like charge, relative to the killing of a grown man. The libel relates that he assaulted John Love, "seising him by the hair of the head, and giving him several blows, bruises and wounds on the face or head, whereupon he called out 'that he had received sore strokes indeed,' went home, languished for two or three days and died ¹." The libel was laid for murder, and was found relevant to infer the pains of law; but the verdict was in favour of the pannel.

ONE thing is to be observed of all cases where no instrument but the hand is used, that if the pannel, before striking, have suffered any real provocation, this will materially affect the construction of his deed. If John without cause assault James, and violently and for a length of time beat him with the fist, so that he dies; the law can presume no other, but that he assaults with the wicked intent to do some great bodily harm. But if he only strike in retaliation of a severe blow, this will not be murder, though James die; because the provocation excludes the supposition of malignity. He intends indeed to hurt; but, being assaulted in this manner, he is entitled to resent, as far at least as goes to a few blows with the hand; and if these are attended with any danger of James's life, he is himself alone to blame for the event. In short, with regard to any act which a person hath right to do, law will presume on his side while it can, that he does not intend the great

¹ The libel is silent as to the weapon with which the blows were given. But it is clear from the debate that they were given with the fist. The same appears from the proof; though some of the bystanders suspected that the pannel had something hard concealed within his hand. But this is neither said nor insinuated in the libel.

great and unlikely evil which ensues ; but will require evidence against him, of one kind or other, that he means to kill or to do some outrageous harm. The case of Archibald was of this description. It was shortly thus : that in the course of a struggle, a person was killed with two blows of the fist on the head, to the surprise of the bystanders, and in such a manner, of which even on opening the head, no satisfactory account could be obtained. It was evident on the whole circumstances of the case, that there was no mortal, nor even highly injurious purpose on the part of the pannel ; and as he had received such provocation of blows from the deceased, as in the opinion of the jury entitled him to strike in the way he did, they found him not guilty of the charge.

HOMICIDE.

Maclaurin,
No. 81. and
p. 517.

ON review of these judgments, it may perhaps be thought of some of them, that they are inconsistent with others, formerly mentioned, by which the relevancy was confined to an arbitrary punishment ; and that in particular there is this repugnancy between the case of Aird in 1693, and of Reyfano in 1724, who escaped with transportation, although, like Aird, he had killed by pushing the person backwards, down stairs. But if the circumstances of the two cases be duly weighed, the judgments will appear to be nowise inconsistent, or rather to be an apt illustration of the doctrine which we have in hand. In Reyfano's case the parties were men, and there was but one blow or push given, by which the deceased was thrown backwards, and at once killed. Now this degree of violence might, and in itself was rather presumable to be done, without a purpose to destroy. Whereas in Aird's case, the repeated kicks, given by a man to a woman, on the side, and the throwing of her down stairs,

Outrageous Purpose, if essential to the Charge.

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Mar. 24. 1713.

stairs, together with the following of her, and the renewal of the same abuse of her person, after she had been disabled by so severe a fall, left no doubt of a malignant and outrageous purpose, if not to kill upon the spot, at least to do her some dangerous and excessive bodily harm. One convenient illustration more of this distinction, is to be found in the proceedings on the charge against Jean Ramsay, for the murder of a sick and infirm person, who had been found upon the street, and carried into her habitation for assistance: "The
 " Lords found the pannel's violently dragging the defunct,
 " a weak and infirm person, out of the bed on which he was
 " laid, so that his head was bled on the bed-stock or floor,
 " and her beating of him on the side with a pair of tongs,
 " and her *again* dragging him out of another bed whereon he
 " was afterwards laid, and his dying within a few hours
 " thereafter, about the time libelled, jointly relevant to
 " infer the pains of death and confiscation of all goods and
 " gear; and found any of the foresaid facts separately relevant to infer an arbitrary punishment; and repelled the
 " haill defences proponed for the pannel." In this, the Court required a reiterated dragging from the bed, to raise the case to murder. But the jury found as follows:
 " Find that part of the libel anent dragging a weak, filly,
 " and infirm man out of bed, once in house, upon a
 " chest and floor, and thereby wounded and bled, and
 " that the said weak and infirm man was dead about eight
 " or nine of the clock next morning proven." Now, on this verdict, as not establishing the requisite degree of violence, the pannel escaped with sentence of scourging, and banishment from the county of her residence.

I SHALL conclude this inquiry with a word or two concerning one situation, which, though somewhat different from the others, seems, however, fit to be governed by the same rule. If a man administer a potion to a woman without her knowledge, in order to procure abortion; and if the composition be of that powerful nature, as probably it will, to be attended with a plain risk of life to the person who takes it, especially when it is taken in this unguarded manner; and if the woman in consequence die; this too seems to be nothing less than murder. Because, though in a different way, he shews the same disregard of her life and safety, and exposes her to the same risk, as by doing outward violence to her person. A case of this sort was tried at Aberdeen on the 10th May 1785; the case of Robert Dalrymple a flax-dresser, and Robert Joyner a druggist. The fact, as alleged, seems to have been, that these persons, having each of them a young woman with child to him, they administered some violent drug to them without their knowledge, (as was supposed for the purpose of procuring abortion), in consequence of which both the women died in the course of the same night. The libel was laid, without any mention of the supposed purpose of the prescription, as for murder by poison, with an alternative of culpable homicide. The Court found it relevant to infer the pains of law. Joyner was outlawed; and the libel was found *not proven* against Dalrymple.

HOMICIDE.

Case of a Woman killed by Potion to procure Abortion.

VII. THESE seem to be some of the most material considerations, towards ascertaining the description of the crime of murder. I will now submit what has occurred to me, concerning the several ways wherein a person may be art and part of murder, and liable to the proper pains of that crime, though the slaughter is not the immediate act of his own hand.

Of Art and Part of Murder.

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hand. This may either be by some part taken in the perpetration of the deed, or by something done in preparation or furtherance of the future act; for all these several modes enter into the composition of our phrase of art and part. It is with respect to the first sort of accession, that the most frequent, though not perhaps the most difficult questions of art and part arise. Yet even here cases of some nicety may happen. For according to the views with which the several persons meet, the share which they respectively take in the doing of the deed, the certainty or uncertainty of the mortal blow, and sundry other circumstances, they may be all in the same or in very different degrees of guilt, and may deserve higher or lower pains, or perhaps some of them be entirely free of the crime.

Of Art and Part
by Presence.

I. ONE thing is plainly reasonable, and among all authorities agreed. That if a number conspire and lie in wait, to kill a certain person, "*si plures, non per rixæ occasionem, sed premeditato concilio, in necem alicujus conjuraverint,*" it signifies nothing by whom the mortal blows are given, nor how few of them there be. Though but one of the party strike, and dispatch with one blow of a lethal weapon, he is not therefore the one actor on the occasion, but executioner, for all of them, of their common resolution: properly speaking he is their instrument with which they strike, and they by their presence are consenting, aiding, and abetting to him in all that he doth; having all of them come thither on purpose to have it done, and being ready to lend their aid, if need shall be. Their presence on the occasion is substantially an assistance. It adds to the terror, confusion, and danger of the deceased, who against the assault of one only, without the appearance of company or support,

support, might chance successfully to defend himself; as on the other side the invader is heartened in the enterprise, by his knowledge of the force provided to sustain him. James Shaw had sentence of death, on a verdict which specifies his presence at the murder, as the main ground of conviction¹. HOMICIDE.
Feb. 10. 1673.

THIS rule is to be understood, not only of those (comparatively rare) cases, where an express and formal compact to kill can be proved, but equally of all, in which from the number, arms, or behaviour and language of the persons engaged, an implied and tacit confederacy may reasonably be gathered. And with respect to the presence of any associate; in this article also, I do not mean to speak of real only and physical presence, by seeing the deed done, but of that constructive presence which is sustained by the law in many other cases; and according to which every person shall be held to be present, who in any shape co-operates in, facilitates, or protects the actual execution of the slaughter. One, for instance, gives notice of the person's approach by signal from a distance; a second, dispatches him at a spot agreed on; and a third, takes post at a convenient place to prevent interruption, or favour their escape: Certainly all the three are in one degree of guilt. By the construction of law, they are all present, and participant of the murder; because at the time of doing it, they are each of them in his place, lending effectual aid to the perpetration

Of Art and Part
by Presence.

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¹ "Find, by his own judicial confession of his being present at the said murder, and other presumptions, that he had accession thereto, and was guilty of art and part of the murder."

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of the deed; and but for this mutual assistance and encouragement, the attempt might not be made.

Of Art and Part
by Presence.

IT is also to be observed, with respect to this rule of convicting on the ground of simple presence, that it is not confined to those cases, where the murder is committed with the proper instruments of slaughter. It is true, that where the whole party are equipped in that fashion, at setting out on the enterprise, or where some of them provide themselves with arms, with the knowledge and consent of the others, those circumstances are themselves evidence of the assent of all of them to the felonious and mortal purpose. And it must be granted, that if the deceased is not dispatched in this manner, but by beating with a staff or the like; here, with respect to any one who has not actually struck, (for there is not otherwise any room for such a question), the stronger proof will be required of his full association to the previous confederacy, and of the high and dangerous nature of the intended injury, or of his actual assent to what he sees done at the time: or at least, the case will be more open to a proof of favourable circumstances on his part; as that he remonstrated with his associates, and did what in him lay to restrain them from any dangerous excess. In the case, accordingly, of David Hume, which was of this precise description; the slaughter having been done in the presence of three persons, by beating the deceased with staves; the Court, after hearing a full argument, found a relevancy on the actual beating only by Hume, and not as libelled and insisted for, on the beating by him, or by the other persons in his presence. The reason was, that no strong circumstances were laid in the libel, to infer his knowledge of any felonious conspiracy to destroy or maim; and that the cause
of

O&A. 16. 1723.

HOMICIDE.

of quarrel was the affair of the other persons, rather than his¹. But still the difference between such cases, and that of slaughter with the proper instruments of death, lies in the matter of proof only, and no deeper. For if satisfactory evidence be obtained of a deliberate plan to way-lay the deceased, and to kill, or to maim and disable him, by an outrageous beating; certainly, in the event of his death, this is murder in all who are participant of that purpose, and stand by to see it executed, approving, or not interposing to hinder the continuance of the outrage.

AFTER what has been said of simple presence, it is needless to enlarge on those circumstances in the conduct of the persons present, which shall be held to prove their assent to the deed, or to amount to an assistance. In general, all such behaviour as tends to impede, disconcert, or intimidate the deceased, in his defence, is as decisive against the pannel, as the striking of a severe blow, or the doing of a direct injury to the person. Thus in the case of David Hamilton of Auchtoul,

Of Art and Part
by Assistance in
the Act.

June 14. 1676.

3 F 2

" finds

¹ " The Lords find, that David Home, pannell, having at the time and place lybelled, beat and wounded George Sweet, servant to John Horsely, possessor of Seton, of which strokes or wounds, he the said George Sweet did soon thereafter dye, relevant to infer the pain of death, and confiscation of moveables."

² This was a very cruel and unnatural case. The pannel and Mair were near relations. His son, Gavin Hamilton, sends Mair a written challenge, and goes to the field, provided with a horse and other equipment to assist him in his flight, if need shall be. Mean while, David, the father, goes to Mair's house, (who was a lad of nineteen), and by threats and insults, draws him to the field to fight, though reluctant. When arrived there, the other persons present endeavour to make peace between the parties; but David Hamilton insists that they shall fight.

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“ finds the libel bearing the pannel’s murdering and slaying
 “ the defunct relevant ; *as also*, that the pannel came to the
 “ defunct’s house, and did entice and persuade the defunct
 “ to go to the fields with him, and that as the defunct was
 “ standing to his defence against Gavin Hamilton the pan-
 “ nel’s son, David the pannel, came behind the defunct and
 “ tripped up his heels, whereby the defunct fell back to the
 “ ground,

fight, and sets them to. Mair, for a time, has the better in the combat, and wounds Gavin in the hand ; on which friends again interpose, and Mair retires. But the father succeeds in again setting them to, and strikes Mair on the side, as he is retiring, and tumbles him down. Having then got to the right of him, as he lay on the ground, so as to hinder his free use of his sword, he thus gives an opportunity to Gavin, who thrusts at Mair, under his father’s arm and kills him. He was found guilty art and part, and condemned to be beheaded.

In the case of Robert Kennedy of Auchtifardale, (July 15. 22. 30. 1756.) The Court found it “ relevant to be proven, that the pannel, after he saw his
 “ son Gilbert, with his sword drawn, did beat or strike the defunct with his stick
 “ or staff, or that the pannel immediately struck the defunct with his cane before
 “ the mortal thrust, so that the defunct’s disorder by the said strokes did hinder
 “ him to defend himself against the thrust.” But this only to the effect of inflicting an arbitrary pain. The ground of this restriction was, that the pannel Robert Kennedy, and the deceased were, at the time when the son drew his sword and killed, actually engaged in the heat and passion of a scuffle, in which they mutually beat each other with canes : So that there could hardly be evidence that the father, in this agitation, had so thoroughly understood and entered into his son’s purpose of killing, as to make him an associate therein. The father might desist as soon as he saw the sword drawn, and yet the thrust follow so quickly, that the deceased could not recover from his disorder ; or he might strike after seeing it drawn, not conceiving that the son meant to kill, but only to separate them, or to protect his father by the show of the weapon. It was thus a quite different case, from that of interposing to strike one of two persons, already engaged in a mortal combat. It rather appears from the proof, that the pannel’s back was turned to his son at the time he drew, and that the pannel did not observe it. The jury found to that effect, and he was affoizled.

"ground, and as the defunct was lying on the ground, the
"said Gavin did thrust him through the body, whereof he
"died, relevant to infer art and part of the slaughter of
"the defunct."

HOMICIDE.

ALL commands, incitements, or exhortations to the deed, if given upon the spot, and *in ipso actu* of the slaughter, are in like manner, a clear ground of conviction of art and part. Thus, in the case of Alexander Maxwell and others, accused of convoking in a church-yard, in arms, and attacking a Presbyterian minister and his congregation, who had assembled for divine service, in the course of which affray, a person was shot; this slaughter was found relevant, as well against Maxwell who gave the command, (but in very strong terms), to use the mortal weapons, as against the actual assailants. Reference may also be made to the case of Davis and Wiltshire, in March 1740. These were two soldiers of a party, who irregularly, and of their own authority, had stopped a cart as loaded with smuggled wine. In the absence of the others, who had gone to inform the revenue officer, a scuffle arose between the pannels and the driver, insisting to drive off his cart. In the course of this contest, the carter wrested the musket from Wiltshire, who thereupon cried to Davis to fire; which Davis did, and killed the carter. The verdict was

Art and Part by
Exhortation *in*
ipso actu.

Oct. 7. 1690.

November 7. 1690. "Find the libel at the instance of the relict and children
"of John Russell, William Hay, &c. bearing Alexander Maxwell and the other
"pannels, their unwarrantable convoking and assembling several persons in
"arms, and commanding them to stab, flick and gore; and the mutilation,
"bleeding and wounding of William Hay, John Murdoch, and others, and the
"slaughter of the said John Russell, relevant; the slaughter to infer the pain of
"death libelled, as well against them who gave command, as against the com-
"mitters of the said slaughter; and the rest of the foresaid crimes libelled, *sepa-*
"ratim to infer an arbitrary punishment."

CHAP. VI.

was thus: "Find it proven, that Thomas Davis pannel, " discharged a firelock at the deceased John Mather, where- " by he received a mortal wound, of which he soon there- " after died; and finds it likewise proven, that Charles " Wiltshire, the other pannel, desired the said Thomas Da- " vis to fire; but does not find the exculpation proven." Af- " ter hearing an argument on this verdict, the Court pronoun- " ced sentence of death on both the pannels.

Art and Part of
Murder done in
pursuance of
another Felony.

2. WHAT has been said of slaughter committed in pursu-
ance of a concert to kill, or to do some grievous bodily harm,
seems to be equally true of slaughter done in prosecution of
any other felony; provided the nature of the attempt im-
ply, or the behaviour and proceedings of the parties indi-
cate, an unity of purpose in all concerned, and a resolu-
tion to controul all resistance of their enterprise by force.
If several go out together, armed, to rob on the highway,
and one of them kill in the assault, it is murder in all those
of the party who are anywise aiding in this robbery, whe-
ther present on the spot or not. For they are all there under
a compact of mutual support; and the slaughter is an obvious
and not unforeseen consequence of the assault, to rob: else
why go they out provided with arms? The like judgment
will be due, if a number be engaged in a house-breaking, and
one of them kill a person in the house, whether to subdue
resistance or make good his escape: even those who ne-
ver enter the house, but only watch without, to prevent sur-
prise, are here guilty of the murder. Or again; put
the case that a score of persons have assembled to rescue a
cargo of smuggled goods, which are in the course of con-
veyance by the revenue-officer, and that they proceed for
this purpose, all or most of them provided with fire-arms. If,
in

HOMICIDE.

in the prosecution of this felonious enterprise, the revenue-officer or any of his party be killed, all the confederates are answerable for it with their lives. For why come they there armed, and in numbers, but in the expectation of resistance, and in preparation to overcome it? All are there at the time in a mutual league of defence and support, by force of arms, in their unlawful project; and it is by the deed of all and each of them, in pursuit of their common object, that the immediate actor has been brought into that situation which has tempted him to kill. It is on their account, as much as his own, that he has made use of his arms. He does so, to protect their persons, and promote their enterprise, in which he has no deeper interest than the others, and which, if he were left single, he would certainly abandon. Were it not for their company, he would not be on the expedition; if others had not brought arms with them, neither would he; and it is to their power, and their disposition to assist him, that he trusts when he makes use of his weapon.

STATING the case, however, of a very numerous assembly; it is more especially necessary to attend to the terms in which our rule has been guarded, namely, that the assembly be of that kind, in which a plain unity of purpose and temper of mind may be observed. For otherwise; as in the case of a great mob, or riotous convocation, which consists of persons who assemble from different quarters, without previous concert, and variously equipped, as well as in various tempers of mind, and for objects of very different degrees of guilt, justice requires an investigation of the conduct of each individual; in order that a judgment may be formed with respect to him, according to the style of his equipment,

Art and Part of
Murder done in
a great Assembly.

CHAP. VI.

Sept. 11. & 13.
1678.

equipment, the language he holds, and the part he acts on the occasion, whether he is to be deemed an accomplice in any slaughter which ensues, or not. It is indeed true, that in the case of James Learmonth and William Temple, the one circumstance of presence in arms at a very numerous meeting where a man was killed, seems to have been judged a sufficient ground of conviction¹, as art and part of the slaughter. And cases may doublets be imagined, where such a judgment shall be unexceptionable; the case, for instance of a treasonable rising in arms. Because the insurgents are combined on the precise principle, of executing their purpose by force and slaughter; so that all who are in the field in arms, are art and part of all the depredations, slaughters, and other mischiefs attending on the state of war, that are committed in their presence. It may also be suitable to such a case as that of the Porteous mob; in which, to the tumult and disorder, there was joined a pointed and special purpose of revenge and slaughter against a certain person; whereof all who came equipped and assisted with arms, might reasonably be held to be partakers. But the charge in the case of Learmonth and Temple was thus. That they and their accomplices, to the number at least of a thousand, and many of them armed, had assembled for a field preaching or conventicle, on the hills of Whitekirk,

¹ Interlocutor. "The Lords Commissioners of Justiciary Having considered the libel and debate, find the libel, reply, and triply proponed by his Majesty's Advocate, viz. presence at the unlawful meeting of the field conventicle libelled, with arms, at which the slaughter was committed; or giving counsel or command in the words condescended upon in the debate, viz. 'Let there be no cowards here the day, Sirs, and let these that have arms go out before,' or the like expressions, relevant; and remits the same to the knowledge of the assize."

HOMICIDE.

Whitekirk, within sight of his Majesty's garrison of the Bass; and that the governor of that place having sent out a party of soldiers against them, they treacherously, after promising to disperse, had set upon the party, some of whom they wounded, and killed one. It appears that this person was killed with a single blow of a halbert; and it was not alleged, that either of the pannels struck the blow, or invaded the man. Now on such an occasion as this, persons might be present in arms from very different motives; some in consequence only of the fashion of the times to wear arms, some for self-defence in case of personal assault on themselves, others *in terrorem*, to prevent disturbance by the show of force, and a few perhaps with hostile purposes, and prepared for slaughter on any molestation. The mere presence in the conventicle with arms, was, however, explicitly found relevant to infer guilt of the slaughter. Learmonth was convicted of exhorting to resistance, and had sentence of death. Temple was convicted of presence with a sword, but undrawn, near the spot where the slaughter was committed; and he only escaped the capital punishment which would have followed in terms of the interlocutor, owing to intercession made for him with the Lords of Privy Council. But this is a precedent taken from an arbitrary period, and relative to an offence in which the State took a great and undue concern; beside that the judgment appears to have been much commented on, even at the time when it was given¹.

In every thing that has been said, this limitation is implied, That to affect all concerned, the slaughter must be done in
3 G

What if Slaughter, not in pursuance of the common Object.
pursuance

¹ See Fountainhall's account of this case, vol. i. p. 12. 13. Also Mackenzie's Vindication of Charles II.'s Government.

CHAP. VI.

purfuance of the common enterprife, in which the party are engaged. For if it be done on fome peculiar and accidental quarrel of the flayer, which is not connected with nor fubfervient to the original defign; or, though it have fome relation to that defign, if a refolution of the whole party to accomplifh their object by fuch extreme means, cannot reasonably be collected in the circumftances of the cafe; in either of thefe fituations all the reafons entirely fail, upon which, by the conftruction of law, the act of one is carried over into the perfons of his affociates. Such a cafe is that mentioned by Foster¹, of three foldiers who went out together, to rob an orchard. Two got upon a pear-tree, and the third flood at the gate, with a drawn fword in his hand. The owner's fon, coming by, collared the man at the gate, and afked him what bufinefs he had there; and thereupon the foldier flabbed him. It was ruled by Holt, that this was murder in him who flabbed, but that thofe on the tree were innocent. They came to commit a fmall inconfiderable trefpafs, and the man was killed on a fudden affray, without their knowledge. It would, (faid that able Judge,) have been otherwife, if they had all come thither with a general refolution againft all oppofers.

Art and Part in
Cases of fudden
Slaughter.

3. THE more ordinary cafe of flaughter is, that the felonious purpofe is taken up on a fudden, upon fortuitous quarrel among perfons who were lawfully affembled for fome other object. And, in thefe circumftances, to convict any one as art and part of the flaughter, evidence muft be shown with relation to him in particular, of fuch things done by him as infer his adoption of the mortal purpofe, and amount to the rendering of affiftance in the execution of it. On the 1ft of

¹ Crown Law, p. 313.

HOMICIDE.

of April 1691, Captain Bruce and Lieutenant Arrot were brought to trial, on charge of a tumultuous attack made by them, along with others, on the city-guard of Edinburgh, at their guard-house, in the course of which three soldiers of the guard were killed. This was the issue of an accidental squabble with the guard, on the King's birth-day, when bonfires were kindled, and the pannels, along with other persons in liquor, were roaming through the streets, in a disorderly manner, in the evening. It was thus obvious that many might be present, and even in some measure engaged in the affray, out of curiosity or indiscretion, or at the worst with no more criminal purpose than that of raising a brawl in the street; and the Court thought it therefore just to require evidence with respect to each of the pannels, of his joining in the mortal assault, by thrusting at the guard with a drawn sword¹. Nearly the same rule was followed in the case of Captain John Price and five others: of whom the libel relates, that being in a tavern they quarrelled with the people of the house, who sent for the guard to quell them; whereupon they suddenly took up a purpose of resistance, shut the door of the house, and drew their swords on the soldiers of the guard. At length, as the corporal of the guard was entering, (having forced open the door),

Nov. 24. 1690.

3 G 2

he

¹ April 2. 1691. "Find the libel anent the slaughter of the said Henry Lincklatur relevant against Lieutenant David Arrot allenary; and find the said libel as to the slaughter of Alexander Simpson and Colin Campbell relevant against both the pannels; and finds the said Lieutenant David Arrot his thrusting at the guard with a drawn sword, relevant to infer art and part against him as to the slaughter of the saids three haill persons killed; and finds Captain James Bruce his thrusting at the guard with a drawn sword, relevant to infer art and part against him as to the slaughter of Alexander Simpson and Colin Campbell allenary."

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he was shot through the head by one or other of the party. Here too the Court considered, that the pannels were innocently assembled at first, and that some of the party might remain in the house rather from fear of the others, or want of opportunity to retire, than from any concurrence in the felonious purpose of resistance. They therefore required evidence with regard to each, of his co-operation in the felony, by striking at the guard, or otherwise opposing them, or at least having his sword drawn against them¹.

Art and Part in
Cases of sudden
Slaughter.

IN these instances, it was unknown by whose hand the mortal blow had been given. But in the circumstances of the fact, this uncertainty could not yield an argument for mitigating the punishment of any one of the pannels, against whom such a co-operation was proved. Because, in employing the proper instruments of slaughter, they had all substantially, though on a sudden, adopted the felonious purpose; were actuated by the same malignity; exerted themselves to one end; and effectually assisted the mortal hand, whichever it was, by their combined attack; which materially affected the terror of the deceased, and his ability to defend himself at the time. By whom the fatal blow was given, was indifferent in such a case, and if known could not tend in any measure to relieve the others; since the deed was equally that of the whole party, as if it had been done on a more regular and deliberate association. For with respect to a number of persons, as with respect to one, it is immaterial as to the guilt of murder,

¹ November 26. 1690. "The Lords find the libel anent the slaughter of the said deceased John Reid, and the pannels their being art and part thereof, by each of them their striking at the guard, resisting or opposing them, or having drawn swords or pistols in their hands, relevant to infer the pains of death."

HOMICIDE.

der, (if there be no sufficient provocation in the case), whether the mortal purpose is of malice aforethought, or is only conceived upon the spot. The deed in the case mentioned, was therefore that of all who assailed with mortal weapons. It has been seen, that in the case of Davis and Wiltshire, a simple command or exhortation to fire was held to be relevant against Wiltshire: much more would it have been so, if Wiltshire had thrust with his bayonet, or had fired his piece, though the mortal injury was done by Davis.

THE other side of the rule is, that in such cases of sudden slaughter, a person is not liable to any punishment, unless he have in some measure been active in the assault. And in illustrating this position, I shall confine myself to the single case of Crief and Cordie, tried in February and March 1719. The libel related, that the pannels, who were soldiers, when standing at the door of their quarters, had thrown out foul language against the deceased, and others in his company, as they passed along the street; and that this being retorted, the pannels proceeded to blows. The issue was, that one or other of them drew his bayonet, and gave a mortal wound. The jury found that Cordie stabbed, and that both had given scurrilous language¹. Now, on this verdict Cordie was adjudged to die, and Crief was assolzied *simpliciter*; having had no accession to any act of violence, far less to the mortal purpose of his comrade.

Art and Part in
Cases of sudden
Slaughter.

THE

¹ " Found it proven, that Neil Cordie, one of the pannels, gave a thrust with
" a drawn bayonet in his hand to John Anderson, in his left side, of which he
" died the next day; and also finds, that John Crief and Niel Cordie pannels,
" gave scurrilous language to the said John Anderson and his company, such as
" saying,—There comes the blackguards and their whores." March 3. 1719.

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Homicide in
rixa per plures
commisum.

THE class of cases which naturally connect with these, are cases of slaughter committed in a sudden brawl or squabble among a number of persons, and without employing the proper instruments of slaughter; and to such cases I understand the law-books to allude, in those passages which make mention of *bomicidium in rixa per plures commisum*, as liable only to an arbitrary punishment. The reasons of such a doctrine, will best be understood by the putting of a common case; that two companies, both of them in liquor, meet and quarrel on the streets of a town, in the dusk of the evening. Words pass at first; and it soon comes to blows, (owing commonly to the fault of both sides), with such instruments as the parties have upon them, or can lay hold of at the time; and in this bustle a man is killed, it cannot be said with certainty how, or by whom, but probably through a succession of injuries inflicted by several persons. In these circumstances, to punish every one capitally who is proved to have struck, or at all to have invaded the deceased, would be an unjust excess. Such a rule is indeed suitable in the case of the deliberate way-laying of a single person by a number; because each of the assailants sees, intends, and measures the violence that is offered by the others; and all is done in the direct prosecution of one wilful plan, to put the sufferer in danger of his life. But in the case now put, where the meeting, the quarrel, and the violence, are all sudden and fortuitous, and where the deceased himself is probably in some measure the cause of his own misfortune, these are strong considerations in favour of the pannels. In such situations the combat goes on confusedly, without any choice of weapons or measures, and as chance wills, rather than with any sort of conduct or guidance, and not only without any precise

precise relation of the act of one to that of another, but without any full knowledge on the part of any one of that which the others have done; so as he may judge of the danger or excess. If indeed it can be shown that the deceased was destroyed by a certain more severe blow, given him by a particular person, this is quite a different case, in which it will become matter of special inquiry with respect to that person, on the whole particulars of what he did, whether he had a highly injurious purpose or not. But keeping to the imagined case; that the death is caused by a succession of injuries, or that the author of the mortal injury is unknown; the result can only be to inflict an arbitrary pain on those of the party who struck the deceased, and entirely to acquit the others, against whom no act of violence is proved. One example of a homicide of this sort, is the case of George Hutchieson and others, August 12. 1784. The charge was, that the pannel and others were assembled in a disorderly manner upon the street, where they insulted and molested passengers; and that the deceased having interfered in behalf of some one who was abused, the pannels, "all and each, or one or other of them," gave him a mortal wound on the head, with a stone, stick, iron-rake, or other offensive weapon, of which wound, after languishing about a month, he died. The libel was laid as for homicide¹, and the prosecutor at calling restricted his conclusions to an arbitrary

HOMICIDE.

*Homicide in
risa per plures
commisum.*

¹ "Where, by the laws, &c. homicide, or the killing and slaying any of the lieges, by beating or otherwise wounding them, so as death follows; or the assaulting, bruising, or wounding any of the lieges to their bodily harm, to the effusion of their blood, and loss of their lives, in a violent, unlawful, and masterly manner; as also the riotously and wantonly assembling on the streets of a burgh, and beating of passengers, and raising disturbances and quarrels therein, are all," &c.

CHAP. VI.

bitrary punishment. The pannels were, however, acquitted of the homicide, and found guilty of the riot; for which they were ordered to be scourged.

Homicide in
rixa per plures
commissum.
Jan. 8. 1711.

WE have an older example of the same character, in the case of Archibald Burnet and John Loudon. These persons being in company with two or three more, and an affray having arisen, in which Redpath, who was a stout man, had collared or laid hold of a stripling, who was a friend of the pannels, blows had in consequence passed on the occasion; and in particular the pannels had beaten Redpath, the one with a cane, the other with a broom-staff, so that his skull was fractured, and he died of the injury. The Court found these circumstances relevant to restrict the libel to an arbitrary punishment¹. And upon verdict finding "that the beating was *per plures commissum*, and that they both had swords about them, and did not make use of them;" the pannels were fined, and ordered to prison till payment.

Homicide in
rixa per plures
commissum.

CASES of this sort seem to be the most proper instances of homicide *in rixa per plures* (i. e. *in turba seu tumultu plurium*) *commissum*. But the same phrase has sometimes been applied to situations, where in truth a felonious murder was committed by some one, and with the proper instruments of slaughter, but in such a way that neither could the actor be fixed, nor the slaughter justly be imputed to all concerned.

The

¹ "The Lords find the libel relevant to infer the pains libelled; and sustain this qualification of the libel, that the beating was *per plures commissum*, in conjunction with any of the two following defences, to wit, that any beating committed by them was in a *tuilzie* or *rixa*, in which they mixed themselves to relieve a youth in the defunct's grips, or in a struggle with him; or, *separatim*, that they had swords about them, and only made use of staves or batons, relevant to restrict the libel to an arbitrary punishment." 22d Jan. 1711.

The case of Lindsay and Brock, according to the story told in the libel, was precisely of that description. They had jostled Anderson as he passed them on the street; and in consequence a wrestling took place, in which Anderson was thrown down, and the pannels came to the ground along with him. Some struggle followed with them in that situation; and when Anderson rose, he was seen to bleed profusely in the neck, and was found to have received a deep cut there, of which in a few minutes he died. The sheath of a knife was found upon the spot where they had fallen, and there was blood upon the face of the one pannel, and upon the hand of the other. But the knife itself was not found upon either of them; nor had either of them been observed to have such an instrument in his hand, or upon him, in the beginning of the quarrel. The verdict of the jury entirely exculpated Brock; and an act of indemnity hindered any judgment from passing on Lindsay. But if conviction had been obtained in terms of the charge, the result must have been to inflict an arbitrary punishment on both; by reason of the uncertainty of the person who gave the mortal wound. That both should escape all punishment on that account, though it was certain that by one or other of them the deceased had been *feloniously murdered*, would plainly have been unfit. And yet that both should be punished with death, would have been utterly unjust; since the mortal weapon had only been used by one of them, who had taken up the purpose in the course of the struggle on the ground; and this, for any thing that could be gathered from the circumstances of the situation, without even the knowledge, and much less the assistance of the other.

HOMICIDE.

July 29. and
Nov. 15. 1717.

CHAP. VI.

Art and Part of
fortuitous
Slaughter on a
lawful Act.

June 9. 1673.

4. THE most favourable case of any to the pannel, for the construction of these questions of art and part, is where the assembly is not only innocent, but for execution of the law, and in obedience to its orders. If a magistrate goes forth to quell a tumult, and one of his *posse*, unnecessarily, and without orders, strikes and kills; this is the peculiar act of the individual, from which no manner of blame or responsibility attaches on the magistrate, whose purpose in going forth the slaughter directly counteracts, by raising a greater tumult. This rule was applied in the case of Mackintosh and Fleming, accused of the slaughter of John and Robert Farquharson. Fleming's defence was, that the slaughter happened in the prosecution of a purpose to take the deceased with caption; to which service he being called, had attended as a witness, but without being anywise active in the slaughter. The Court found with respect to Fleming, that simple presence was not relevant¹; and required a proof that he had killed, wounded, or assaulted the deceased, or at least had behaved as an aggressor.

Of Accession
before the Fact.

VIII. IT is now time to pass on to the other mode of accession, which consists in things done previous to or in pursuance of the slaughter, without any (even constructive) presence at the deed itself. 1. In regard to accession before the fact. It is in the general obvious, that whosoever, being in the knowledge of the mortal purpose, though contrived and imagined

¹ "And as to the remanent dispute against Fleming, the Lords find, That simple presence is not relevant against him; but sustains the libel against the said Fleming, it being proven that he either killed or wounded the defunct Robert Farquharson, or assaulted him with arms, or behaved himself as an aggressor, notwithstanding the messenger's execution bearing him to be a witness to the caption."

HOMICIDE.

gined by another, shall lend immediate and material aid towards the execution of it, is thus involved in the substantial guilt of murder. He becomes partaker of the distinguishing character of the crime, the deliberate cruelty and malice, or depravity of heart. He encourages the others to the deed by his countenance and fellowship; and as far as he facilitates or forwards the enterprise, he must be held to be the cause why the thing is done; since the withholding of these aids might have altered the time, place, and manner, and chance of success of the attempt, or perhaps might have hindered it from being made. The apothecary, for instance, who prepares and furnishes the deadly drug, to be applied by another to the person of his neighbour, truly takes the most material step in the whole process, and removes the main obstacle to the perpetration of the murder; and though not personally present at the administration of his dose, has however his heart in the business as much as his associate, and is equally deserving of the highest pains. The same is true of him, who, by false pretences, entices the victim to a place where he may conveniently be set upon, and gives notice to others, to way-lay him; or who lends the use of his house, as a convenient station from which to fire on his neighbour, though he purposely leave home on the day when the deed is to be done; or who harbours the assassins there till the convenient season, and accommodates them with arms suited to their design¹, or with disguises to do it in, or with money and horses, before hand, to favour their escape. In the case of David

3^d H 2

Hay

¹ "Opem ferunt, qui cum crimini patrato non interfuerint, ferramenta tamen, tela, venena commodaverit, sciens cujus rei causa commodaret." Mathæus, Proleg. Chap. i. No. 11.

CHAP. VI.
Mar. 16. & 17.
1692.

July 17. 1611.

Aug. 11. and
Nov. 22. 1697.

Hay and John Thomson, for the murder of Hay's wife¹, the jury found Thomson guilty of furnishing, and Hay of administering the poison; on which verdict both had sentence to be hanged, and to have their heads cut off, and affixed on the goal of Lanark. Reference may also be made to the case of Muir of Auchindrayne; who, having received a letter from the Tutor of Cassillis, acquainting him of his intention to travel next day to Edinburgh, and requesting Muir to meet him at a certain place on the way, gave notice of these things to Kennedy of Drummurchy, that he might way-lay and kill him; which Kennedy accordingly did. For this base deed, and for afterwards murdering William Dalrymple, a boy who had been employed as a messenger on the occasion, Muir had sentence of death. In like manner, Patrick Kininmount had a relevancy found against him, on the furnishing of swords and lighted candles towards a combat in

¹ " Find the pannel David Hay guilty in terms of the libel, by administering
" poison to Helen Langrigg his spouse, of which, by the common report of the
" country, she died; and also finds the pannel John Thomson, commonly called
" Dr Thomson, guilty of having furnished the said David Hay with the poison
" administered; and therefore, by plurality of voices, finds him guilty art and
" part."

In the case of Bisset and Currier, June 15. 22. 1705, the libel was found only relevant for arbitrary pain against Currier, by whom the poison was procured. The reason seems to have been, that the libel did not precisely charge, that she gave it to or procured it for Bisset, for the purpose of administering to the deceased. The charge is only thus: " She the said Jean Currier did buy from David
" Millar, apprentice to Patrick Blair, apothecary in Dundee, an ounce of arse-
" nick unprepared, which she said, she was to make use of to kill a dog that had
" bit her leg, *which arsenick he the said William Bisset did get from the said Cur-*
" *rier.*"

in or near his own house ; in which one of the parties fell ¹. This too was sustained, independently of the charge, also made in the indictment, of the pannel having instigated the parties to fight. The case was not prosecuted to an issue.

HOMICIDE.

FOR what reason it was, I know not, that the like relevancy was not found in the case of James Edmonston. The occasion of this trial was, that the Master of Rollo had been killed by Graham of Inchbrakie, in their way from a house where they had dined together, in company with Edmonston, M'Naughton, the Laird of Clavage, and others. Edmonston was Inchbrakie's friend and comrade; and, *as the libel told the story*, (but it was not fully supported by the proof), Inchbrakie having insulted Rollo at table, Edmonston abetted him in his rudeness. The two whispered to each other at table, and Edmonston was heard to say to the other, "*I would not baulk him, Inchie.*" They then left the room, were absent for a while, and returned. In the evening, after supper, the whole party left the house together, and took the same road on horseback. At a certain spot, however, Edmonston and Inchbrakie parted for a short space from the others; and Edmonston having unloosed his sword-belt, gave his sword to Inchbrakie, who had none upon him. Rollo and Inchbrakie then fell behind the party, by themselves; and in a short time the others, riding on at some distance, heard the clashing of swords. On turning back, they find Rollo wounded and dying. Clavage exclaims, "*O what*
" *a*

Of Accession
before the fact.
July 29. and
Aug. 3. 1695.

¹ " Find the first article of the libel, *viz.* the furnishing Petrie and Glasfoord " with swords and lighted candles, whereby Petrie wounded said Glasfoord, " and Glasfoord thereafter died, relevant to infer the pains libelled." The libel concluded for the pains of death.

CHAP. VI.

“ *a foul murder !* ” and Edmonston answers, “ *I think not so, but that it was fairly done.* ” He then exchanges his hat with Inchbrakie, who flies ; and next morning, Edmonston’s sword and that of the deceased are found upon the spot. All these qualifications were found only relevant to infer an arbitrary pain. A special verdict was returned, convicting him of certain only of the circumstances libelled, (as indeed there seems to have been no proof of more) ; and he was banished Scotland for life.

Of Accession
before the Fact.

NOTWITHSTANDING this judgment, which is single of its kind, it seems to be true of all cases, where the assistance consists in furnishing the immediate means of doing the deed, those means without which it either would not be done at all, or at least would be done after quite a different manner, that they are proper cases of art and part. I say the immediate means of doing the deed. For if the assistance be only indirect and remote, this, though accompanied with the knowledge in general of the actor’s malice and evil design, cannot safely be made the ground of conviction. Put the case, that John reveals to James his purpose of revenge against a certain person, their common enemy, who resides at a distance ; and that James lends him a horse for the journey, or gives him money at his request, to carry him to that quarter of the country. Some weeks after, James is informed that the person in question has fallen ; but as to the circumstances of his death, and the particular contrivance of his destruction, these he only learns from common fame, after the thing is done. Though highly blameable in the part he has taken, he is not, however, punishable capitally, as art and part of the murder. The reason is, that what he has done, is no part, properly speaking, of the

HOMICIDE.

the contrivance or story of the slaughter, which alone is the matter of the charge and trial. It is true, he has assisted the *man*, and helped him into a possibility of attempting this homicide. But he is not, and cannot be accessory to the particular deed of slaughter, whereof the notion as to its time, place, and manner, and all the circumstances of its description, was not so much as formed, at the season when he gave his assistance. For aught that he knew, the felonious purpose had been laid aside, or never had been seriously entertained. And though his aid has been of service to the actor at one period, in bringing him into the situation where the thing might be contrived and done; yet it in nowise entered into the immediate act of contrivance or execution, so as to prompt, relieve, or assist the persons engaged. It is also to be considered, on the part of the remote assistant, that he has not passed through the same trial of his malice and determination, as the principal actor and his immediate coadjutors; never having felt the terrors, agitations, and alarms, that await on the last hours of consultation in such enterprises, when there is just time, and no more; to repent and to desist¹. He has not, like them, had the deed made present to his imagination, by knowledge of the detail with which it is to be done; nor had the same opportunity as they, of being shaken with fear for himself, or with pity for the destined victim. They have persisted, notwithstanding these visitations of nature; but he has been put to no such test of his heart and temper, and ought not therefore to be judged as that same hardened and unpardonable offender, of whom no hope
can

¹ " Between the thinking of a guilty thing,
" And the first moments of the execution,
" All is combustion; and the state of man
" Suffers the nature of an insurrection." *Shakespeare.*

CHAP. VI.

can be entertained. Besides ; with respect to all aid of this remote description, aid that is referable to the man, rather than to the special act ; its connection with the issue, and the share which it contributes to the prosecution and success of the attempt, is too conjectural and uncertain a matter, to be a safe ground of judgment in these questions of life and death. Whereas, in that which palpably is subservient to the particular plan, the associate knows how far his assistance is material, and testifies, by affording it, his final resolution, and his desire of the event.

Of Accession
before the Fact.

AND here I am led to observe, that to be sustained as a ground of art and part, the assistance must not only be immediate, but it must be material too ; such as substantially forwards, and encourages to persevere in the enterprise. For if it only relate to some insignificant particular, in which the actor might easily be accommodated otherwise, or which, if refused, would neither hinder the deed, nor materially alter the manner of it ; then cannot the rendering of this service be construed as a participation of the contrivance or execution of the slaughter, nor as a proof of any thing but a degree of favour to the enterprise that is afoot. To descend to particulars : If the pannel lent the assassin his watch, that he might know the hour, (having to lie in wait for the deceased), or told him the nearest road to the lurking place, or gave him victuals to sustain him on his way thither ; no one of these things, *per se*, seems to be a sufficient ground of conviction.

Of Art and Part,
by Order to kill.

2. ONE may also be art and part of murder before the fact, (though it cannot be a frequent case), simply by commanding to do the deed, without any farther part taken in the prosecution

HOMICIDE.

prosecution or maturing of the enterprise. An officer of the army, for instance, (if such a thing could happen), who on report brought to him by his inferior officer, gives him orders to fire on the populace molesting his party, is equally answerable for the consequence, (if the firing cannot be justified on the state of the case), as if he personally commanded the party. That he has been deceived with respect to the nature of the situation, is no excuse; for he ought to go to the spot and be convinced of the necessity by his own observation, before he give any absolute order in a matter of this importance. The same will hold with respect to the magistrate, conveying rash orders to the officer, on the like occasion. It is upon the like ground, that the Judge is equally answerable as the inferior ministers of the law, to whom his warrant is addressed, in case of the execution of his illegal sentence of death.

IN cases like these, the relative situation of the parties is a good reason, why the act of slaughter ought to be at the hazard of the person who gives the order. But lawyers have said, that the same will even hold in other cases of command, so it be urgent and authoritative, and issued to such persons who on the whole may reasonably be supposed to be under its influence, though they be not truly bound to the same discipline, and implicit obedience, as in the situations above mentioned. Between parent and child, for instance, or husband and wife, and perhaps, in some quarters of the country, master and servant, or chieftain and clansman, cases may be imagined, (though they would need to be strongly circumstanced, and in truth none such have ever been the subject of trial), in which the order given, and immediately obeyed, may of itself be a ground of conviction. But it will very seldom happen, that such an order

CHAP. VI.

Feb. 14. 1558.

is not accompanied with circumstances of assistance, or other concern in the deed, less or more, to strengthen the charge; which too is not so favourable a sort of charge in the present state of the manners and habits of the country, as it may have been in former times. In the short memorandum relative to the case of Alexander Home and Margaret Home, (but of what crime accused is not said), the Justice finds, "That the words of the causing command assistance and ratihibition, is of the same substance as art and part ¹." In the case too of Mackintosh, in June 1673, the Court declared, "That command and hounding out in general falls under the compass of art and part in such cases." At the same time they found "that the particular qualifications of command and hounding out mentioned by the pursuers in the dispute, are not relevant to extend to mandate, or hounding out, to found a criminal pursuit." As mentioned by Mackenzie ², the reason of this judgment was, that the words of command to kill, though strong, were however in this respect ambiguous, that they might only relate to the case of the deforcement of the messenger, along with whom the pannel sent his sons to execute the caption.

Of Art and Part
by hiring to kill.

3. ANOTHER case of order or mandate which is certainly relevant, (and this though there be no bond nor relation between the parties), is that of order accompanied with the giving of a bribe, or hire, to do the deed. For the actor is here to be considered only as an instrument in the hand of the employer.

4. THE

¹ This is extracted from the MS. Abridgment in the Advocate's Library, vol. i. p. 45.

² See Mackenzie, tit. Art and Part, No. 4.

4. THE article in this department which seems chiefly to be liable to controversy, is that of accession by counsel or instigation; which, according to some authorities, is of itself sufficient to subject the adviser to the pains of murder. Certain things may be observed, on the one and the other side, which will at least serve to circumscribe the debate. It must be yielded, with respect to that sort of counsel which is not purely such, but truly amounts to a share in the contrivance of the deed, that this is ground of conviction as art and part. He, for instance, who not only exhorts and urges in general to do the slaughter, but proceeds to show how easily and how safely it may be done in a certain way, or at a certain time and place, and opens the detail of a contrivance for execution of the purpose, which plan is accordingly followed, may justly be accounted one of the most important persons in the story, though he leave the entire execution to his associates. An address of this kind is not a naked advice, which has no effect on the person to whom it is given, farther than as a coincidence of wishes, but is in truth a most substantial assistance, which may be of as much service towards the perpetration of the deed, and may as much determine the actor to the attempt, as even the promise of presence at the fact. The adviser here equips the actor for the business; *instruit concilio*; and is the life and source of the enterprise. The case, already mentioned, of Muir of Auchindrayne, was in some measure of this description; because the pannel had not only instigated the actor, but had advertised him of the convenient time and place, when the deed might with certainty be done. Perhaps it is with reference to this sort of counsel, *concilium cum ope*, that some of those authorities are to be understood, which speak of instigation, (or *bounding out* as it is termed with us), as amounting to art and part.

HOMICIDE.
Of Art and Part
by Counsel to
kill.

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Of Art and Part
by Counsel to
kill.

IT is no less plain on the other part, with respect to any advice which does not favour of assistance, that it must at least be very serious, urgent, and pointed, to bring it under the compass of art and part. No proclaiming of it as a meritorious thing to destroy the deceased; no words of mere permission or allowance to do the deed; no intimation of thanks or approbation if it shall be done; not the strongest expressions of hatred to the deceased, nor the most earnest wishes for his death: none of these things come up to what the law in this matter requires. Because, though wrong and blameable, they are, however, all of them, nothing more than the expression of the party's own disordered state of mind; which may indeed tend to infect others with the same evil disposition, and to make them susceptible of mischief; but still has no relation to any special attempt or immediate course of action, nor is even a certain proof of that settled habit of mind in the speaker, which would make him join in any such enterprise, if it were actually afoot. This rule is exemplified in the case of Barbara Coutts; where, though a capital relevancy was found on the general charge of art and part, yet her particular expressions of rage and hatred against the deceased, though very bitter and malignant, were found to be only punishable in some inferior way. In short, the only counsel which can plausibly be maintained to come under the intendment of the law in this matter, is a direct and special counsel; a persuasion to kill by use of the topics calculated to work on the particular man, and relative, less or more, to some near occasion of doing the deed; whereby to excite him to an immediate course of measures towards the slaughter.

MacLaurin,
No. 97.

EVEN

EVEN with respect to this sort of counsel, if in any case it is to be sustained to involve in the pains of the principal offence, it is at least under provision, that the counsel have been the slayer's main incitement and spring of action; that circumstance in the case, without which the deed would not have been done. For if John, bearing malice to James, lay a plan to kill him, and communicate this to George, who encourages and confirms him in his purpose, but without lending any sort of aid, George cannot be punished as author of the murder. It is thus a material consideration in all such cases, In whose quarrel was the deed done? in that of the adviser or the actor? If in the actor's quarrel, certainly the just presumption will be, (for to this we must have recourse in the impossibility of tracing the truth), that in a matter so interesting to him he was mainly determined by his own passions and impressions, and would have acted as he did, if he had been left to himself. The bare advice, without proffer of comfort or assistance, cannot reasonably be supposed to controul the will of a free and independent person on such an occasion, where all the labour and all the risk of the enterprise is to be his own. If, on the contrary, it can be shown that the quarrel was the adviser's business, or the common concern of both, this is a circumstance on the other side. And if it be strengthened with other considerations, such as the dependence of the actor on the adviser, or the known ascendancy which the adviser has over him; possibly such a case may be made out, (though none such has yet been tried), as shall fix the guilt on the adviser, as author and imaginer of the deed. Put the case, for instance, (though perhaps not the most likely to happen), of a young woman, instigated by the father of a natural child with
which

HOMICIDE.
Of Art and Part
by Counsel to
kill.

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which she is pregnant, to destroy it on the birth. Let us suppose, that his letters to her are recovered, in which he opens the purpose to her; insists on the evil consequences of a discovery of her situation; persuades her how easy to be done, and to be concealed; and by artful arguments palliates the wickedness of the proposal. In return to these, suppose her letters also to be recovered, at first rejecting the purpose with horror, and in the sequel bearing the history of her gradual and reluctant compliance on his account, and won over by his influence and importunity. If such a case could happen, without some farther circumstance of aid or contrivance on the part of the man; perhaps it might be held to possess all those qualities which are naturally requisite in an advice, to bring it under the description of art and part. But it is obvious, that a case of pure and simple advice, possessed of all those qualities, and in which the history of the guilt is at the same time capable of being substantiated by proof, is rather supposed for the sake of illustration, than likely to be the subject of trial.

Case of Mandate, &c. to kill, retracted.

WE may now dismiss these cases of hire, command, and counsel, after making this observation, which is applicable alike to all of them; that the mandant, adviser, or so forth, can only be liable as art and part, if in truth the slaughter is done under the influence of his commission or advice. If he repents him of his purpose, and comes to the actor to retract his command, and seriously does all that in him lies to dissuade from and hinder the deed; though the actor should persist, whether because his heart is now full of enmity, through his long meditation on the subject, or that he *will* do it to be revenged of the mandant, and make him guilty by prosecution of his order in spite of

of him, he is at least free of the guilt of murder: though he never can entirely wipe out the stain he has contracted, by proceeding to so hazardous a length against his neighbour. Again; if the case be that the mandant has only meant to retract his commission, but in truth has not done it, though only owing to an accident, such as the loss of a letter or the like; he has then no advantage by his altered purpose: For it is still true, that on his mandate this murder has been committed. He is the cause why any such accident is of moment in the case; and at his hazard it must therefore be, if, by any means, his order is not countermanded, but runs on, and comes to an issue. He has laid and kindled the train, and he must break it off at his peril.

HOMICIDE.

By the same rule, it will not even acquit the mandant, that the slaughter has been committed without his express order, if it be the natural and probable consequence of that which he commanded to be done: As if he order John to waylay and violently beat James, and John beat him so that he dies; or if he order John to rob James, and on his resisting, John kill him on the spot. In all such cases, having authorised a great and dangerous wrong, he must answer the ordinary concomitant hazards, which he might and ought to have considered, just as in any crime committed by himself in person. There is the same reason, why no variation from the command should free the giver, if it is only a variation in the circumstance and manner, and not in the substance of the act; as if the person be knocked on the head instead of being shot according to the order, or if on command to kill him on such a day at such a place, and this opportunity being lost, he is killed some days after, and at the next convenient station.

Case of Mandate
to injure follow-
ed with Death.

BUT

CHAP. VI.

Case of Variation from the Order to kill.

BUT what shall be said, if there is a variation in the person killed, by dispatching one person instead of another, against whom alone the mandate was? Foster seems well to have resolved this question by a distinction. If John have hired James to poison such a one, whom James well knows, and James, choosing rather to execute his own enmity, give the poison to another; there can be no good reason why John should answer for this event with his life. The link is wanting here between the act and the order. James, at applying the poison, is in nowise under the influence of John's order, but only uses it as the occasion of executing another and quite a distinct crime, which in the wickedness of his own heart he has conceived, and wilfully grafted on it. But if John hire James, to lie in wait for George at a certain place by night, and William, happening to pass at the appointed hour, is killed by James, who mistakes him for George; this is quite another case, and such as affords John no manner of plea for relief. The mortal blow has been given under the influence of his warrant and instigation; and the accidental variation which has happened, is just one of those natural and probable hazards of the case, which the contriver of the situation must run: Indeed the mistake might equally have fallen out in his own hands, if he had been actor as well as contriver. The snare he wickedly laid for one, another, through his guilt, has fallen into, and perished. The malice, therefore, adheres to him, and connects with the actual, equally as it would have done with the intended, even. Doubtless, the actor also is answerable for the deed of his own hand, which is equally wicked, whether he kill the person intended, or another. In these observations, I have followed the doctrine of the English authorities,

ties¹, and chiefly of Hale and Foster; which is grounded in natural and universal principles, and seems both to be more reasonable, and more precise, than that which Mackenzie, on the authority only of the foreign doctors, and not of any thing which has been settled by our own custom, has delivered.

HOMICIDE.

I SHALL not enter farther into a discussion of the many possible questions concerning accessories before the fact; but shall observe as a conclusion to the whole, that there can be none such in culpable homicide on provocation, nor in homicide in self-defence *cum excessu moderaminis*; because it is in the nature of all such slaughter to be done on a sudden, and in such a manner as excludes all previous counsel or concert. It is possible, on the other hand, to imagine cases, where the mandant, instigator, or contriver, shall be answerable, and the immediate actor be entirely free. As if an idiot or a madman be set on to murder; or if one give a person poison through the hands of his servant, which the servant administers, believing it to be a safe medicine. The servant is innocent, but the furnisher of the poison is guilty of murder. This actually happened in the case of Robert Bisset, who administered poison June 15. 1705. to his wife by the hands of their servant Helen Jamieson, to whom he delivered it as a medicine, which had come for his wife from the apothecary. This servant was the chief witness against him on his trial. But he was not convicted to the full extent of the charge; and therefore escaped with his life.

3 K

IX. THE

¹ Hale, vol. i. p. 617.; Hawkins, b. 2. ch. 29. No. 18. *et seq.*; Foster, p. 370. 371.; Blackstone, vol. iv. p. 37.

CHAP. VI.
Of Accession
after the Fact.

July 15. 1642.

Sept. 21. 22. 23.
25. 1752.

IX. THE only other sort of accession is by things done after, and in pursuance of the act of slaughter; such as concealing the dead body, approving the deed, harbouring the actors, or enabling them to escape. It is clear, that, taken along with previous knowledge of the purpose of slaughter, or instigation to commit it, or any aid lent in the contrivance or execution of it, this of after assistance will be a strong ingredient to make out the charge of art and part; as it strengthens a train of facts, which on the whole go to prove a share taken in the enterprise, and indeed to presume a promise of that assistance which is afterwards given, and whereof the expectation would substantially encourage to the attempt. And here I may cite the case of Robert Walker, and David and Margaret Graham, tried for the murder of Isobel Walker, the wife of Robert. The sole actor here was David Graham, who strangled the woman in a solitary place in the night; being instigated thereto by the other two, who contrived the occasion of the deed, by sending her on a pretended errand in the night. Robert expressed his joy on hearing that the deed was done. And having taken her plaid, and wrapped it round the corpse, he, with the assistance of the other pannels, carried it to the river, and cast it into a salmon cruive. On these grounds, they were all found art and part of the murder, and were condemned to die. Of this description also was the noted case of James Stewart in Aucharn, for the murder of Campbell of Glenure; where the assistance given the murderer to escape after the deed, was joined to sundry circumstances of previous aid and comfort towards the commission of it. It is true, that this trial was attended with several very unusual things in the manner of conducting it, and for which it would be very difficult to find any apology; but I see no reason to believe that the verdict was not according to the justice

justice of the case, or different from what the jury were warranted to return upon the evidence laid before them. HOMICIDE.

BUT, how sufficient soever the grounds of conviction in these and the like cases; it is a very different sort of charge, and seems to constitute a distinct offence from homicide, where the after assistance is libelled by itself, unconnected with any earlier knowledge of, or concern in the deed. To assist in concealing the dead body; to harbour the actors, and help them to escape; to rescue them from the officers of justice; to bear false witness for them on their trial; or to persuade others to do so, or to suppress their testimony against them; all these are, doubtless, immoral and criminal acts, and from which suspicion may sometimes arise against the persons convicted of them, of a deeper concern in the deed. But they are no part of the history of the slaughter; nay they do not even necessarily infer an approbation of it; since they may be done out of affection only or compassion for the actors, to relieve them of the consequences of that which cannot be remedied nor undone. In the case, accordingly, of Barbara Coutts, her assisting to conceal the corpse was found only relevant to infer an arbitrary pain¹. In the case too of Thomas Bryce, (taken notice of by Mackenzie), being that of a father resetting his son, who had committed murder, and deterring a constable who pursued him red-hand, the pannel's plea

Maclaurin,
No. 97.

Mar 22. and
June 1. 1039.

3 K 2

seems

¹ The interlocutor uses the term of *the pains of law*, but is opposed to that of *the pains of death*, used in the former part of the same interlocutor.

On the 8th of November 1555, Marieta Montgomery, Lady Semple, came in will on a charge of resetting the murderers of Gilbert Rankine, "Per ejus domine servitores commissi, per receptationem suorum servitorum qui crimen prædictum commiserunt, manu sanguinea, seu recenti, eadem nocte, infra castum de Laven, immediate post crimen perpetratum." But I do not find that any sentence followed.

CHAP. VI.

seems to have had the effect of hindering the libel to be prosecuted to any issue. It is true, that in his observations on the statute 1426, c. 91. that author seems himself to have given a different opinion of our law. But in this he has not duly attended to the statute which he cites as his authority; for it has relation only to the harbouring of denounced criminals. Besides, even in the times (if ever there were such), when this enactment was observed; still the resetting of the manslayer was not punished as an accession to the murder, but as a special and distinct offence *of resetting*, created by statute for the better execution of justice, which was then so difficult to be enforced.

Of Accession by
ratifying the
Deed.

WHAT is true of these modes of after assistance, seems to be equally so of that still more remote concern, which only consists in ratifying and approving the murder; whether by speaking in praise of the deed, or more substantially, by reward bestowed on the actor, or by comfort and countenance rendered him on account of it. To applaud, and much more to recompense so foul a crime, is indeed a thing of too pernicious example to pass uncensured by the law; not to mention, that suspicion may naturally be entertained of those who thus praise and confirm the deed, that they secretly abetted it beforehand. Yet still, by itself, and unsupported with proof of instigation or assistance, it is only a misdemeanour, and not a participation of the act of slaughter; not even, which is the most unfavourable case for the pannel, though it should appear that in his name, or on his quarrel, the deed was done. For one man cannot implicate another in guilt, by acting on his own opinion of his wishes and desires, if these have never been communicated to him the actor in a palpable form, so as to be motives of his deed. And
it

it is not a certain inference, that he who expresses satisfaction at the doing of such a thing without his risk or participation, would have authorised or have taken a part in the enterprise, if proposed to him. Besides; if the inference were even certain, the fact has not happened so; and it is not for their evil dispositions that men are punished, but for the evil things which they have actually done. There are indeed certain texts of the Roman law, which have often been quoted on the other side¹; but I find nothing in the books of adjournal to countenance the opinion, that our practice would be determined by those authorities. It must, however, always be remembered, that if the pannel not only ratify the deed when done, but have known and countenanced, or have instigated to it, beforehand, this may amount to an accession; especially if the actor be a person under the influence² of the approver, such as a son, a servant, or the like.

HOMICIDE.

ON the whole of our inquiry concerning these several ways of accession, by instigation, order, ratihabition, or assistance after the fact, the result seems rather to be, that though cases cannot be supposed often to happen, so strongly circumstanced with respect to any one of these grounds of charge,

as

¹ Dig. de vi Armata, L. 1. No. 14; L. 3. No. 10.

² This was the description of the case of Robertsons, March 6. 9. 1671, indicted for casting down of houses. The actors, tried along with him, were his own sons, pupils, resident in the house with him, from whence they set out on the enterprise, attended with a host of his tenants and dependants, and to which they returned after throwing down the houses. He then in very strong terms approved of what they had done, blamed them for not doing more, and continued to reset and entertain them. These circumstances, related in the libel, were found to be a relevant ground of charge. As they might also be in a case of murder.

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as to make it relevant of itself, yet, taken jointly, they may amount to a just ground of conviction.

Of the Trial of
Accession to
Murder.

LET us now add a few words, concerning the mode and form of process against an accessory to this crime. In this article, the courts of England seem to be embarrassed with a number of subtle, and (as they appear to us) unsubstantial distinctions, to which our practice is a stranger. With us, the principal actor and the accessory, in whatever way he is so, may be called in one libel, and put to the bar together¹. Or if the actor has fled, the accessory may be tried on that same libel, after sentence of fugitation passed on it against the actor; for the prosecutor has nothing farther in his power. This was done in the case of Robert and Gilbert Kennedy, in July 1706; and of Stewart of Aucharn, in September 1752. Nay, the trial may even proceed without that sort of sentence against the actor, which is only a sentence for contempt, and does not take place on the notion of the outlaw's guilt of the charge, or if it did, still could be no manner of presumption against his associate, who can only be convicted on full proof of the *corpus delicti*, and of his own concern in the slaughter, in like manner as if no fugitation had passed. This point seems to have been finally settled in the case of James Edmonston. Being brought to trial, alone, on a libel which stated the murder as the act of another, and him as instigator only and assistant, he pleaded, that

May 29. and
July 29. 1695.

¹ This was found on full consideration, in a case of indictment for casting down of houses; the case of Robertsons in March 1671; where the principal actors were two boys, the sons of the instigator and ratifier. The rule seems to be equally applicable to a charge of murder David Hay and John Thomson for administering and furnishing poison, were accordingly tried and convicted on one libel in the same diet. March 16. 17. 1692.

HOMICIDE.

that the trial could not proceed until the actors were convicted, or at least discussed by sentence of fugitation. This dilatory objection was repelled, and the trial went on. The same judgment had been given long ago, in the case of Muir of Auchindrayne, in July 1611, who objected that Kennedy, the actor, had not been discussed. Indeed, every objection of this sort is in a great measure excluded by the very form of our criminal libel, in which the pannel is always charged in both characters, of actor or art and part; whereby the case is laid open to a conviction of either sort of guilt, as the fact may turn out to be. It is also certain, that under this form of charge, the prosecutor is admitted to a proof of all circumstances, prior, concomitant, or after the fact, from which the accession may be inferred.

X. THE pains of law for murder, are the pains of death, and confiscation of moveables. In atrocious cases, it had been usual for the Judge to award some farther suffering or indignity, the better to mark the public detestation of the crime; such as striking off the hand before execution; the hanging of the dead body in chains; the quartering of the body, and affixing of the head and limbs on conspicuous places, to keep up the memory and terror of the example. And by a late statute, the 25th George II. ch. 37. entitled, *for better preventing the horrid crime of murder*, it is ordered, that the sentence shall be for delivery of the body to surgeons, to be dissected, (unless ordered to be hung in chains); and that in no case shall the body be buried, until it be dissected. It farther appoints, that during the period between sentence and execution, the convict shall be confined apart from all other prisoners, and without access of any person to him, unless.

Punishment of Murder.

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unless by permission of the Sheriff, or of the Court where he was convicted; as also, that he shall be fed (excepting in case of violent illness), with bread and water only.

Affygment in
what Cases due.

Maclaurin,
No. 99.

WHERE it happens, that the pannel is only convicted of culpable homicide, or that sentence is prevented by an act of indemnity, or that he escapes execution of the capital sentence through interposition of the royal mercy; as also, according to one, but a doubtful decision, where he is outlawed for non-appearance; in all these situations, one other consequence is, that he becomes liable in a sum of money, or *affygment*, as it is called, to the widow and children, or other the next of kin of the deceased. This exaction, whether it is properly to be viewed as *damages* decreed to those persons in satisfaction of the injury which they sustain by the loss of their relation, or, (which is the opinion of Lord Kames¹, and in itself seems not improbable), as the remains of a more barbarous state of things, before the full establishment of public justice, when the criminal redeemed his blood, and pacified the resentment of the kindred, by payment of a stated composition²; has at all times been part of our custom. And this so firmly, that even the Sovereign never pretended to have any power of protecting the criminal against it; so far from it, that by the ordinary style of all remissions, they bore a clause obliging to assyth the party³. And indeed, such was the strictness observed of old in this matter, that we find the Court ordering a person to be kept in

¹ See Law Tracts, vol. ii. art. 1. at the end.

² See this matter argued, Maclaurin, No. 98.

³ See Act 1424, c. 46.

HOMICIDE.

in sure ward during the space of forty days, thereby allowed him to find caution for the assythment, and in case of his failure so to do within that time, "to be justifyit and " execute to the deid for the saids crimes, notwithstanding " his remissione, conform to the law." This was in the case of Peter Dunne, April 19. 1554¹. Farther still; it was by more than one statute provided, that no remission should have effect, nor be allowed in Court, unless it proceeded (and bore *in gremio* so to be), on evidence of satisfaction already made to the kindred, and on the sight of sufficient *litteræ pacis*, or *letters of slains*, obtained from them. These were letters, signed by the four principal branches of the kindred of the deceased², or the greater part of them, bearing receipt of the assythment, granting oblivion of the injury, discharging the offender of all action, civil or criminal, at their instance, on that account, and requesting the King to grant him a remission. But though this in strictness was the law; in practice it had long ago been thus far relaxed, that a remission might pass in Exchequer without production of the letters of slains, on surety found there to the satisfaction of the Court, for payment of such a sum as should afterwards be awarded.

1593, c. 173.
178.; 1581,
c. 136.; 1592,
c. 157.

3 L

IN

1 " And because the said Peter Dunne could get nae sufficient soverties to find " for him for assythment of parties of the gudes and skaiths above specified, " the Justices therefore decernit him to be keepit in sure ward within the said " tolbooth of Edinburgh, while the said sovertie were fundin by him, swa that " he find the samen within forty days next hereafter; and failzing of finding " thereof the saids fortie days being by past, doome was given upon him to be " justifyit and execute to the deid for the saids crimes, notwithstanding his re- " missione conform to the law."

¹ See Balfour's Practicks, p. 517.

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What Court
competent to
tax Assythment.

IN this course of proceeding, the care of taxing and decreeing for the assythment, as an appendage of the pardon, naturally fell to the Judges of Exchequer. But of late years, the ordinary course of expediting remissions has been, that they go from the Secretary of State's office to the seals *per saltum*, without passing through Exchequer at all. And in consequence, the practice has been introduced of allowing a remission in the Court of Justiciary, on surety found, (and sometimes on enactment of the party himself¹), to pay such assythment as shall afterwards be modified in the proper Court. Commonly, the care of fixing the sum, and seeing the caution duly found, has been remitted by the criminal Court to the Barons of Exchequer; owing probably to their ancient connection with this sort of business. This was done in the case of Macneil, (who appears to have lain in goal until evidence was produced to the Court, of his payment of the sum taxed in Exchequer); in the case of Mathews, November 13. 1721; of Sir Gilbert Elliot of Stobs, July 30. 1727; of Joseph Hume, December 22. 1732; and of David Hume, March 27. 1733. But on occasion of Sir James Stewart's remission, for the slaughter of Moody of Melfetter, the remit was to the Court of Session; where process was accordingly raised by the son of the deceased, in June 1741. The same course was taken at allowing the remission in favour of Thomas Roy, June 24. 1760. And indeed it seems probable, that on pleading of pardon in the Court of Justiciary, they are as competent to tax the assythment themselves, as to delegate this office to any other judicature.

In

¹ This was allowed at passing the remission in the case of Piccars and Collins, 22d April 1728; they being strangers and soldiers, and unable to find surety. As also in the case of Joseph Hume, 22d December 1732.

July 21. 1717.

Mar. 3. 1740.

In the above cases of Sir Gilbert Elliot ¹, Joseph Hume, and Thomas Roy, the interlocutor was accordingly guarded with a provision, saving the right of the Court to do this duty themselves in any future case, if they should see cause.

HOMICIDE.

BUT be this as it may, in the case of a remission ; at least it is not disputable, that where a prosecution in the Court of Justiciary is at instance of the kindred of the deceased, and issues in conviction of any sort of culpable homicide, it is there a regular and legitimate part of the sentence, to tax and award the assythment. As was done in the case of Mason, July 13. 1674; of James Sommerville, December 8. 1704; and of Lieutenant Storrie in January 1785. And again, in all cases where this interest has not been previously settled by decree of some other competent judicature; there, of their own right, and independently of any remit, the Lords of Session have jurisdiction in process brought for the assythment by the next of kin, as a matter of pure pecuniary interest, which is the proper province of that Court. This seems to be assumed, (for I do not think it is introduced), in the enactment of the statute 1592, c. 157.; and two instances of such a proceeding are to be found in Maclaurin's Reports, No. 98. and 99.

What Court can tax Assythment.

As to the distribution of this *solatium*.—According to the decisions shortly mentioned in Balfour ², the widow has

Assythment, to whom due.

3 L 2

right

¹ “ Declaring always, That it should be but prejudice of this Court to modify and determine such sum or sums in name of assythment as they should think fit, in all such cases that should come before them in time coming, notwithstanding of the above reference to the Barons of Exchequer.”

² Practicks, p. 517.

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right to a share along with her issue, the heir along with the other children, and the immediate issue, to the exclusion of the more remote descendants. It seems to have been held, that he who first pursued for the assythment, though not the nearest of kin, would exclude the nearer relations; at least, if by refusing to concur in the prosecution, they had shown a want of the due regard to their deceased kinsman.

XI. ACCORDING to the order proposed in the beginning of this Chapter, I have now to treat of the cases of AGGRAVATED MURDER; those cases, where either on account of some peculiar baseness or cruelty in the mode of the deed, or on account of the relative situation of the parties, our custom proceeds against the murderer with more than usual severity.

Of Murder under Trust.

I. I SHALL be brief upon the first example, that of murder under trust, as a matter which cannot now be the subject of any question in a court of justice. The thing was established by the statute 1587, ch. 51. which declares it to be "quhair the partie slaine is under the traist, credite, assurance and power of the slayer," and raises the crime to the rank of treason; ordering the offender to "forfault life, lands and goods." In themselves, the words of this description are somewhat equivocal; and what the meaning of the Legislature was might have been subject of controversy, unless we had been informed by history¹, of the occasion of passing the act; namely, the murder of the Laird of Maclean in 1586, by one of the Macdonalds who had been in feud with him, but enticed him to his house with special invitations, and promises of safety. The proper cases therefore,

¹ See Spottiswood's History, p. 343.

HOMICIDE.

therefore, to which the statute applied, were those where the deceased had put himself into the killer's power, as at that particular time, under the pledge and assurance, (either express, or implied in the nature of the situation), of hospitality, safety, and protection; and in these it would more especially hold, if there had been previous feud between the parties, to occasion the exacting of such a pledge. It was understood in this sense in the following cases, where sentence passed for the statutory pains. The case of William Ross of Dunskeith¹, who bearing deadly hatred to Gibson, enticed him by a friendly invitation to the house of a third party, entertained him hospitably there throughout the day, and at length, in the evening, invited him to lodge in his (Ross's) house; which Gibson having agreed to, Ross and his servants murdered him in the dark, on the way. The case of Peter Weir, who murdered John Hamilton at an appointment which he had made with him, under pretence of settling certain controversies at law that were between them. The case of Muir of Auchindrayne, who having appointed to meet his ancient enemy, but late ally, the Tutor of Cassillis, at a certain place, gave notice of this to others, and instigated them to kill him. The case of John Maxwell of Gerrarie and his son, for the murder of Mackay of Glassack, a person who had for some months been residing with them at bed and board, "sua that nae suspicione of injurie (says the record) to be done be the said John Maxwell could be thocht of be him." He was killed one evening, when coming to the house of Gerrarie, in company with Maxwell's sons.

July 26. 1605.

June 29. 1611.

July 17. 1611.

Dec. 15. 1619.

It seems to be more doubtful, whether the judgment was right in the case of Andrew Rowan, and also of the said William

Of Murder under Trust.
Aug. 2. 1627.

¹ He was also charged with the murder of his own wife.

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July 26. 1605.

Nov. 14. 1628.

April 21. 1664.

May 17. 1665.

Dec. 16. 1677.

Jan. 22. 1663.

Jan. 23. 1688.

liam Ross, which extended the statute from those cases of special or covenanted trust, to that general and constant state of confidence, in which married persons may be said to be, with respect to each other. In the next case which happened, that of John Jamieson, the murder of the pannel's wife was libelled as simple murder. In that of John Swinton, it was again charged as *treason*; but after full debate, in which Sir George Mackenzie pleaded for the pannel, the libel was restricted to a charge of *murder*, aggravated by the relation of the parties. The like restriction took place in the trial of Margaret Hamilton, for the murder of Robert Bedford her husband; a case of note at the time, and which seems to have been tried with extraordinary care. And although in the later case of Robert Downie for the murder of his wife, the libel is laid for murder under trust, and is found relevant in general terms, yet the sentence is for the ordinary pains of murder.

INDEED, if the statute properly related to the case of spouses, it was equally applicable to the trust between parent and child. But Stair reports the case of Yeaman against Oliphant, relative to the murder of a mother by her son, where the Lords of Session found that this was not murder under trust. And in the case of Philip Standsfield, for the murder of his father, where the statute was libelled, the Court found the charge only relevant to infer the pains of death¹. But on these or any other difficulties which may have arisen touching the construction of this law, it is needless

¹ "As to the pannell's murdering his father, mentioned in the indytement, they found the libell, as it is libelled and qualified, relevant to infer the pains of death."

less to enlarge; since the statute of the 7th of Anne, c. 21. has reduced this offence to its natural and proper rank, of an aggravated murder.

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2. THE same statute took away that Scottish treason, introduced by the act 1593, c. 177, which was committed by killing in the Parliament House during the sitting of Parliament; or in the King's chamber of presence, the King being in the palace at the time; or in presence of the King wherever he is; or in the King's council-house during the sitting of the Privy Council; or within the Inner Session-house, during the sitting of the Lords of Session for administration of justice.

Of Killing in the royal Presence.

3. A THIRD sort of treasonable slaughter that shared the same fate, was that of *assassination*; which, in the case of its being done for service rendered to the King or Church, had been raised to the degree of treason, by the statute 1681, c. 15. which was made on occasion of the murder of Sharpe, Archbishop of St Andrew's. In our practice this term seems not to have been understood in its restricted and most proper sense, of slaughter committed for hire, and in the quarrel of another, but more generally, as of any slaughter done "*per insidias et industriam*," or by deliberate lying in wait. It is used in that sense in the statute above cited, as also throughout the trial of James Mitchell, (in January 1678), for his attempt on Bishop Sharpe, some years before.

Of the Pains of Assassination.

4. ANOTHER

The following are passages in the libel: "You did daily contrive, resolve and design, the murder and assassination of the said Archbishop." And again, "And after you had attempted and committed the said villany and assassination "*tanquam insidiator et per industriam*, and by way of forethought felony, you
" did

CHAP. VI.
Of Murder by
Poison.

4. ANOTHER sort of murder, which, according to Mackenzie¹, had been made treason by the statutes 1450, c. 31. and 32. is murder committed by means of poison. And certainly, in every point of view, it justly holds the rank of a dangerous and aggravated murder; whether it be considered with respect to the deliberate and continued malice which is shown in the contrivance of it; or the cruelty of such a way of compassing death, which (as Mackenzie observes) is such, that the law will not employ it even against a criminal; or the impossibility of guarding against such attempts, which those persons have the easiest and most frequent opportunities of making, who are in situations of confidence and trust. Nevertheless, it will be difficult to find a warrant for applying the pains of treason to this crime, in either of the above mentioned statutes; whereof both the words and the rubric, (whatever might be the intention of the Legislature), are strictly limited to the homebringers of poison, and have no relation to the users. And thus we are at no loss to account for that which Mackenzie himself, both in his Treatise of Crimes and his observations on these statutes, has remarked, (though he wonders how it should be so); that he had found no instance in the records, of the pains of treason inflicted on the giver of poison. Yet not a few atrocious cases had happened, to which probably the Judges applied the utmost severity, that was held to be within their power. I shall mention one of the most remarkable. On the 1st of December 1613, Robert Erskine, and his sisters, Helen, Isobel, and Anne Erskine, were convicted of conspiring to destroy two youths, his nephews, sons of the Laird

"did go away and escape," &c. The term is used in the same sense in the trial of John Maciver and Alexander Mowat, 15th December 1686, for the murder of Maciver's master, for whom they lay in wait in the wood of Humby.

¹ B. 1. tit. 8.

HOMICIDE.

Laird of Dun, his brother, by forcery and poison, in order to get possession of the family-estate. The libel relates, that for this purpose they went and consulted with Janet Irving, a notorious witch, how they might best destroy the children; and that she furnished them with certain herbs, to compose a draught; of which the eldest boy having drank, was seized with violent vomiting, and died "in great pain and dolour", uttering these or the like words upon his deathbed, "Wo is me that I ever had right of succession to ony landis or living, for gif I had been borne some puir cotteris sone, I had nocht been sa demanit, nor sic wicket practicks had bene plottit againis me for my landis." The other boy recovered. These pannels were convicted, and had sentence to be beheaded; which was executed on all but Helen, who was allowed to go into banishment. There is no mention of forfeiture in the sentence. Neither is it any part of the doom on John Dick and Janet Alexander his spouse, who were convicted in March 1649, of the murder of his brother and sister, having poisoned them with arsenick, which was administered in a loaf or *bannock*.

BUT it is needless to enter farther into this discussion now, after the statute of Anne, which has lowered this sort of murder from the rank of treason, if ever it stood in that degree. The following are some of the most noted trials for it in later times. Nicolas Cockburn was convicted of the murder of her husband and his mother; a crime to which the main incentive seems to have been, to disappoint a beneficial settlement in favour of the mother as a widow. Andrew Wilson was convicted of poisoning his spouse; for the purpose, it appears, of marrying a younger wife. In August 1765, Patrick Ogilvy and Catharine Nairne were convicted of the crimes

Of Murder by
Poison.

Aug. 12. 1754.

Aug. 9. & 12.
1755.

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of incest and poisoning her husband, who was Ogilvy's brother. The catalogue may properly be closed with the no less atrocious case of Mathew Hay, convicted at Ayr, in May 1780, of poisoning and attempting to poison a whole family; one of whom, the person chiefly meant to be destroyed, was pregnant by him at the time. She, her sister, and her sister-in-law survived, though grievously injured in their health; but her father and mother died.

Of Murder by
Poison.

To bring a case under the description of murder by poison, it is not indispensable that the stuff or substance administered be of that kind, which is ordinarily known and distinguished as a poison; if the circumstances of the case yield pregnant evidence, on the whole, of the pannel's intention to destroy by means of it. Which may not only appear from the known quality and common operation of the thing, (as where arsenick is given or verdigrise); but also from the excessive quantity, or the frequent repetition of the dose, being of a substance such as hemloc, tartar emetic, and many others, which are used as medicines: and may also appear from the age or the condition of the person to whom the composition is applied; as if a few drops of laudanum are given to a new-born infant, or if a person, for some slight complaint, is made to take large and repeated doses of the very medicine, the most suited to increase and aggravate it into a mortal illness. How unlikely soever such a thing, it did once happen: I refer to the case of George Clerk, John Ramsay, and William Kennedy, to which Mackenzie alludes, but without giving a full account of it. Clerk and Ramsay were servants to John Anderson, merchant in Edinburgh; Kennedy was an apothecary's apprentice; and these three had conspired to rifle Anderson's house, and to kill him by poison, for their greater security of the spoil. The season

Jan. 16. and
Feb. 8. 1676.

HOMICIDE.

season happened to be sickly, and a flux was prevailing in the town. And this opportunity they took advantage of, to administer such medicines to him in his drink and victuals, as might bring that complaint on him; which accordingly in a short time ensued. They next gave him a potion, to lay him asleep; and while he was in that state, they broke into his repositories, and plundered him of money, jewels, and other effects, to a considerable amount. Contrary, however, to their expectation, the disease appeared to abate, and the man to be in a way of recovery; which made it necessary for them to administer still more violent purgatives, such as might instantly waste and destroy him. One dose appears to have been given on a Saturday morning, another on the evening of the succeeding Sunday, and early on the morning of Monday he was dead. A libel laid for theft and murder upon these grounds, was found relevant against Clerk and Ramsay. The jury found them "guilty of the theft, and also guilty "of designing" (that is conspiring), "to dispatch John Anderson the defunct, and giving him powders and jallops to "that effect." They were condemned and executed accordingly. With respect to Kennedy, who furnished the medicines and received part of the plunder, a debate ensued on the relevancy of the libel; and in the end, after he had lain twenty months in goal, the Court saw cause to banish him on his own petition, without pronouncing any interlocutor on the charge. July 30. 1677.

5. THE crime of parricide also, is one of those which find a fit place in the list of aggravated murders; being such, of which the laws of all countries have agreed in testifying their abhorrence, by denouncing some extraordinary punishment for the person, who shall be convicted of so wicked and unnatu-

Of the Pains of
Parricide.

HOMICIDE.

ral a deed. What our Legislature has fixed on for that purpose, is a total corruption, (contrary to our ordinary custom), of the convict's blood; so as that all his posterity may "be disinherited in all time hereafter, fra their lands, heritages, tacks, " possessions;" which are to devolve on the next collateral relations, in the same manner as if the direct line had failed. This is ordered by the statute 1594, ch. 224. with respect to him, "that has slaine, or shall hereafter slay his father or " mother, gudefir or gudedame." Mackenzie has given his opinion, that these terms are not to be extended to the killing of a father or mother by affinity. And indeed, beside the reasons which Mackenzie has given, there is this other, that in themselves the relations by alliance are not in the same degree of awe, reverence, and sanctity as the natural; on which account, in the construction of the statute against beating of parents, which uses the same terms of *father and mother*, it has been found¹ that they do not include father nor mother-in-law. The same author has said², that though not *in terminis* so expressed, the statute may however reach the case of the parent killing the child. But, beside the general rule against extending any penal law by implication, there seems reason to doubt this from the very nature of the statutory pains, which are not suitable to that situation, and would be attended with the absurdity of disinheriting the grand-child, in the case of the murder of its father by the grand-father. Neither has this opinion that support from the authority of the Roman law, which Mackenzie has supposed. For though the slaughter of a child, and also of some other relations, was known

¹ Case of Brown and Chalmers, July 18. 1735.

² Tit. Parricide, No. 3.

known by the name of parricide in the Roman system; yet the peculiar pains of parricide, by drowning the convict sewed up in the same bag with a dog, a viper, and an ape, were confined to the case of proper parricide by the murder of father, mother, or other relation in the direct line of ascendants¹.

HOMICIDE.

UPON the whole, Mackenzie inclines to the severe construction in the case also of natural children; because, (says he), this is a crime against nature. But what he alleges on the other side seems to be the better reason; that they ought not to be subject to the disadvantages of a state, whereof they do not enjoy the benefits. And if this be a sound plea, it applies equally to the case of the slaughter of either parent; since, how certain soever the natural connection with the mother, the bastard child does not inherit of her, nor of any person through her. It is always to be remembered, that the question is not about the personal punishment of the murderer, but about a patrimonial consequence to his issue, and this only introduced by a positive ordinance, which in using the terms *father and mother*, may fitly be understood to mean only those relations, which are acknowledged by the law in other questions.

Do they reach
natural Chil-
dren.

I HAVE found but four convictions of this monstrous crime in the record. That of John Dickson, eldest son of Dickson of Belcheſter, April 30. 1591, who had sentence to be broken on a *row* or wheel; that of Philip Standsfield, February 6. 1688, for the murder of his father Sir Philip Standsfield of Newmills; that of William Rutherford, September 7. 1694; and that of James Lauder, February 14. March 7. 1707. The two last persons had sentence to have the right hand

Convictions of
Parricide.

¹ Dig. ad L. Pomp. L. 9. No. 1.

CHAP. VI.

hand struck off, before execution. For what reason I know not, the statute was not libelled in any of these instances. One of the circumstances stated in the libel, and given in evidence, in the case of Standsfield, as a presumption of his guilt, was that the dead body of his father bled afresh when the pannel touched it. He was, however, convicted on very strong presumptions.

Of Child Murder.

6. IT yet remains to take notice of another sort of murder, which also passes under the name of parricide, (in a loose sense), and is of all murders the most frequent; the murder of a child by its own parent. This too, more commonly happens by the hand of that one of the parents, who by nature stands most attached to the child; but whose affections, in the case of an unlawful intercourse, have to struggle with the also natural and strong emotions of shame, the fear of relations, and too often the dread of want, and the bitterness of treachery and desertion: A struggle the more difficult to be sustained, as she has to bear it in secret, and for a length of time, and without any aid of counsel, or of comfort, to support her. Besides; this sort of slaughter is the more likely to be frequent, that it is not like others, which excite immediate inquiry by the sudden disappearance of a known person, and are proclaimed by the plain marks of violence upon the body, as soon as it is found; but on the contrary, by steady denial of the pregnancy, and a secret delivery, and concealment of the dead body, may be placed beyond the reach, (in a great measure), of ordinary legal evidence to detect it. Add to this; that even when the body is discovered, there is yet so great a difficulty of ascertaining whether there has been life in it¹; as well as that the

¹ See on this subject, an able paper of the late Dr William Hunter's, published in *Medical Observations by a Society of Physicians in London*, vol. vi. art. 26.

the new and tender life may be suppressed with so little use of violence, nay, without any violence at all, by bare neglect and want of care of the helpless infant ; circumstances which at once tempt and reconcile to the deed.

CHILD
MURDER.

It appears that this evil had been much felt in the years 1680 and 1681 ; of which period there are very numerous trials for child-murder, and these, for the greater part, of the kind above described, in which a jury could not convict, without proceeding on such presumptions as are not very desirable to be trusted, in a matter of life and death. To repress, therefore, the growing frequency of the crime, and, as far as might be, to relieve juries from so painful an exercise of judgment, the Legislature added an enactment to the statute-book, the act 1690, c. 21. which is framed on the like plan that had been followed in some other countries, and authorises, or rather obliges, a jury to convict, on proof of certain *indicia* or presumptions of guilt, without direct evidence of murder. The circumstances selected for this purpose are, that the woman have concealed her situation during the whole period of pregnancy, and have not called for help to her delivery, and that the child is found dead, or is missing. Even before the passing of this law, juries in many instances, though not invariably, had been in the use of attending to these presumptions. Most of the many convictions obtained in January 1681, were upon no other grounds, and the same is true respecting some others of older date ; that, for instance,

Of the Act
1690, as to
Child Murder.

* See 21st Jac. I. c. 27. Edict of Henry II. of France, an. 1556.

CHAP. VI.

of Margaret Black, of the 4th August 1677¹; that of Margaret and Agnes Taylor of the 24th June 1663; and of Bessie Brebner of the 17th July 1663. Also, in June 1614, Janet Brown was convicted of child-murder, in regard she went out to the fields, and so neglected the ordinary help for being delivered. Nay more; even in cases where the jury, not choosing to proceed on such grounds, had acquitted the pannel of the murder; still the Court in those days, were in the use of considering the presumptions of concealment and failure to call for help, and of inflicting some correction, and sometimes a severe one, for this blameable course of conduct. In this situation, Margaret Ramsay had sentence to be scourged, and to be banished from the city of Edinburgh, March 6. 1662. And on the 20th August 1662, (but with this difference, that the jury expressly remitted the presumptions for the consideration of the Court), Marion Lawson was sentenced to be scourged, and to be banished from the sheriffdom of Mid Lothian.

Child must be
amissing.

LET us now attend more particularly to the circumstances which the statute has required, to place a jury in this, (as it must be admitted to be), distressing situation. It is the fundamental circumstance, that the woman be proved to have been pregnant, and that the child be missing, or that the dead body of a child be found, which is proved to be her child. In the former case, the proof of the pregnancy can only be by those symptoms in the state of the woman's person, which show

¹ " The Lords find the pannel's murdering her own child relevant, and remits the same to the knowledge of an assize; as also, they remit to the assize to consider how far the probation of the presumptions and circumstances libelled does infer the pannel guilty of the said crime of murder."

show her to have been recently delivered, (or, as I find the witnesses often express it, to be a *green lighter woman*). The statute has presumed, that decisive evidence of the pregnancy may in this way be obtained, (else it could not have ordered any thing in the case of a child that is missing), and that where the birth is a mere abortion, or has not been foully dealt with, it will not be put out of the way. The libel was accordingly sustained, (though, for a separate reason, the prosecutor only insisted for an arbitrary punishment), in the case of Catharine Smith; where the child was still missing at the time of trial, and no evidence was offered of her having brought one forth, other than the condition of her person. In the case of the body being found, that evidence may be strengthened, if the woman, on being shown the body, has before witnesses admitted it to be that of her child; which confession, of itself, has always been held sufficient proof of that material fact against her. An argument was maintained to the contrary, but without success, in the case of Margaret Crooks; who was convicted, and had doom in terms of the statute. The verdict also against Marion Govan, December 7. 1703, on which she had sentence of death, specifies her acknowledgment of the child as the ground of conviction¹.

CHILD
MURDER.

Nov. 3. & 24.
1701.

July 28. Aug. 5.
Dec. 2. & 4.
1718.

It may here, before proceeding, be proper to observe, that this alternative of the child being found dead, or being missing, which was perhaps necessary to be inserted in the statute, seems in some instances to have crept also into the

Form of this
Part of the
Charge

3 N

libel;

¹ "Find, &c. That Marion Govan pannel, is guilty of contravening the said act, by concealing her being with child, and not calling for help in the time of the birth, and after notice of her being brought to bed the child was found dead, which she acknowledged to be her's."

CHAP. VI.

Feb. 15. 1720.
Nov. 14. 1720.
July 24. 1721.

libel; which bears an alternative charge, that *either* the child was found dead *or* was missing. The libel is in that form in the case of Helen Marshall, of Ann Brown, and of Janet Hutchie. Now, (though in none of these cases was any objection stirred), the propriety of such a charge may seem to be doubtful. This is a matter of which the prosecutor never can be ignorant; and he is obliged to make his charge definite and positive, as far as the circumstances of the case allow him. Nor has the statute given him any dispensation in this respect, but only put two grounds of accusation in his power, either of which he may employ, as the case happens to be. I have not observed that this fashion has been followed in later times.

Of the Conceal-
ment of Preg-
nancy.

THE statute has, in the second place, required, that the woman conceal her pregnancy during the whole space. And touching this article a question has arisen, whether there be need of an active and industrious concealment (if I may so speak), on the part of the mother, as by the use of devices to disguise the state of her person, or by positive denial of her pregnancy to such as inquire; or if it satisfies the statute that she fails to reveal her situation; which, as a negative, will prove itself. The former construction was argued for in the case of Margaret Paterson, August 18. 1712, and of Helen Marshall, February 15. 1720: But no regard was paid to the plea on either occasion; as indeed it seems to proceed on rather a strained interpretation of the words. That the contrary is the settled doctrine, farther appears from the verdict and judgment in the case of Catharine Bell. The jury did not find that this woman had concealed her pregnancy, but negatively, thus, "and do not find it proven that she ever revealed her being with child during the whole space of her being
" so."

Nov. 7. 21. 22.
1726.

"so." Upon which verdict, the Court proceeded to give sentence of death.

CHILD
MURDER.

IN this place, we have farther to inquire concerning the disclosure which the law means to exact of the pannel, Of what kind and degree it must be, to save her from the sanction of the statute. One thing never was doubted; that the law did not mean to exact of her an open proclamation of her shame, but only such a disclosure, as in itself may be sufficient to take off the presumption of any evil purpose against the child on its birth. If she reveal therefore to two or three persons, though these be even her own relations, and though to all others she persist in denying her pregnancy; this has always been held sufficient to avoid the presumption of the law. In particular, it had that effect in the case of Elizabeth Orrock, where the jury found, "That during the said time of the said pannel Elizabeth Orrock's being with child, she revealed the same; Jean Orrock the pannel's sister-german being one of the witnesses¹." In the case, also, of Elizabeth Johnston, tried on the 7th and 8th of the same month, the jury had in this matter given credit to the assertion of two witnesses; one of whom swore, that she revealed to him, in the presence of some other persons. They found in general terms that she had revealed; and thus the woman's life was saved.

Proof of Disclosure of the Pregnancy.

Mar. 1. & 3.
1715.

It is liable to more doubt, and has been the subject of opposite judgments, whether a disclosure ought to be sustained

Disclosure to one person; if sufficient.

3 N 2

that

¹ She swore, that no one was present when the pannel revealed to her. There was but one other witness, who swore to a different occasion, when the pannel had spoken ambiguously.

CHAP. VI.

Nov. 22. 1695.

Feb. 28. and
Mar. 3. 4. 1709.

that is made to one person, alone. On the libel against Christian Park¹, the Court, in their interlocutor of relevancy, expressly repelled the defence of disclosure made to one woman, at the distance of five weeks after the pannel found herself with child. But another, and a later case, was at least more humanely, and I think more soundly judged, the other way. I mean the case of Isobel Taylor, where the jury "find her being with child revealed to one witness, and as for the other defences not proven;" whereupon she was *simpliciter* assailed. The disclosure in this case was on the evening preceding the pannel's delivery, and to a woman who gave her lodging in a barn, where she was delivered, alone, in the night. The truth seems to be, that the disclosure to one person, if this person be such who is under no temptation to keep the secret, may fairly be considered as a revealing to many persons more.

Disclosure to the
Father, if sufficient.

BUT what shall be said, if the one person to whom the pregnancy is disclosed, is the father of the child? On the one side; the statute has not distinguished, but has spoken of revealing in general terms. On the other; it seems difficult to understand the law as having regard to any but that sort of disclosure, which indicates the mother's purpose to take care of her child, and puts it in some probability of being saved. Now this can hardly be said of a disclosure to the father alone, who may often be little disposed to interest himself in the matter, and whose treatment of the mother it sometimes is, that urges her to the crime. This point cannot

¹ " Find the indictment relevant to infer the pains libelled; and repel the defence of her telling to one single woman, that she was with child, five weeks after she conceived herself to be with child."

cannot be said to have yet received a decision. It is true, that in the case of Marion Burnet, the Court sustained "the defence proposed by the pannel, that she revealed her "being with child to the father during the time thereof; "and that the child was not come to the full time when "born." But these defences are sustained jointly; and the last seems to be relevant, of itself. In the later case of Margaret Stewart, the father swore positively that she revealed to him, but desired him to keep the matter to himself. The jury, notwithstanding, found her guilty; and she was condemned to die. But in this way, (for any thing that appears on the record), the point was never judged of by the Court.

**CHILD
MURDER.**
Mar. 3. 1709.

Mar. 22. 1743.

IN whichever way this question may afterwards be decided, (if unfortunately it shall again be tried), it will be difficult to follow one invariable rule, (though the statute has made no distinction,—but neither was it necessary), with regard to all disclosure, to whomsoever made, or with whatsoever views. For what if the mother disclose her pregnancy to some one, and at the same time her resolution to destroy the child when born, and endeavour to seduce this confidant to approve and assist in the purpose? Instead of invalidating, such a disclosure strengthens the presumption against the mother. Is it nevertheless to be held, that the case is thereby taken from under the operation of the statute? Or again; is it to be held sufficient, though she only reveal it to an idiot, or to one of such tender years, as cannot be supposed to make any use of the information?

THIS question also had been started respecting the article of disclosure, whether it must be voluntary, or will be equally available though occasioned by constraint; as for instance,

Must the Disclosure be voluntary.

CHAP. VI.

Nov. 18. & 25.
1734.

stance, on examination before a Justice of the Peace, or a kirk-session. There was a debate, but no decision by the Court, on this matter, in the case of Jean Cowan, who proved that the kirk-session, entertaining suspicions of her situation, sent a midwife to her, to whom, though with some difficulty, she was prevailed on to confess; and that she afterwards renewed her confession to the kirk-session themselves. The jury found a verdict in her favour. And it should seem, rightly: because all such confessions are truly voluntary; as well as the situation of the woman is the same, and her temptation to destroy the child is equally at an end, by the divulging of her shame, whether it happen in the one way or the other. For the same reason, and as the statute has not distinguished, it seems not to make an absolute difference in law, at what period of the pregnancy the disclosure be, whether in the beginning or towards the close; though the nearer it is to the period of delivery, the stronger is the presumption in her favour.

Must the Disclosure be positive.
Mar. 12. & 23.
1713.

ANOTHER, and a more delicate question, occurred in the trial of Margaret Anderson: it relates to the degree of certainty with which the pannel must express herself in regard to her situation. One witness swore, "That in the beginning of May last the deponent asked Margaret Anderson, "if she was with child, and she said *she thought she was with child*: That there was nobody present, and from that time till the child was born, she never did any more acquaint the deponent therewith." Another witness swore, "That having suspicion that the pannel was with child, she did about the middle of the month of May last inquire at the pannel whether she was with child or not, who made answer, *That she did not know perfectly whether she was*
"with

"with child or not, but that she thought herself to be with child." The jury, by a plurality of voices, "found the libel proven, "in so far as she brought forth a child without calling for "help in the time of the birth. And found, that the two "witnesses in the exculpation are not concurring, in so far "as the pannel's declaration anent her being with child "was not positive to them." She was in consequence condemned to die. But I think her case was rigorously judged, not only by the jury, but the Court also. For this verdict, which is of the nature of a special verdict, cannot be said to bear an explicit finding, either way, on the article of concealment, which is however a necessary circumstance of the statutory crime; beside that the verdict does not say, either that the child was missing or was found dead.

CHILD
MURDER.

LAST of all; (though of this not many illustrations can be supposed to happen in practice), it seems to be a necessary quality of the concealment, that it continue down to the death of the child. For though the mother deny her pregnancy during the whole space, and be delivered without help; yet if she relent, and do not at that time destroy the child, but preserve, acknowledge, and show it as her's; happen to it afterwards what may, the investigation of the alleged murder is in this case matter of common law, and in nowise subject to the statutory rule. For according to the whole context of the statute, and especially by the words *found dead or amissing*, it is plainly intended for the one case of murder done on an infant unknown, and in the view of concealing that any such has ever existed. Whereas, in the case now put, the mother's shame is published, and more effectually than it would have been by any declaration before the birth; her child is known to have been born alive; is neither found dead, nor is missing

Concealment
must be till the
death of the
Child.

CHAP. VI.

missing *on the birth*; and cannot afterwards disappear without occasioning suspicion and inquiry, as in the case of any other existing person. A situation not very remote from this was once the subject of trial. Christian Oliphant, being with child, had confessed the fact to the family in which she lived. She brought it forth, however, in the fields, by the river Tyne, secretly and unassisted, and travelled away with it to some considerable distance. A man saw her with it, alive, immediately after the birth; and at the place where she slept that night, and remained next day, it was seen, alive, by the people of the house. Early, however, next morning, she went off from her place of lodging without warning; and the body of the child was soon after found in a coal sink. The indictment against this woman was laid upon the statute; but was restricted, at calling, to an arbitrary punishment, "In respect the pannel was found with the child alive." She emitted a qualified confession; was convicted in terms of it; and had sentence to be scourged and set upon the pillory.

March 3. 1701.

Disclosure of
Pregnancy; its
effect.

IN regard to the effect of disclosure proved on the part of the pannel;—this, at one period, was only to save her life, leaving her liable to some inferior correction. The reason was, that by the supposition of the case, she still had wilfully and wrongfully neglected to make the requisite provision for her condition, or to use assistance in the delivery; and in this had shown a criminal indifference about the fate of her child; exposing it to the plain risk of being destroyed in the birth. By the ordinary style, therefore, of interlocutor, as used for many years, it bore a clause in these or the like words, subjoined to the finding of a relevancy on the statutory charge. "And for restricting the foresaid
"relevancy

“ relevancy to an arbitrary punishment, sustain the defence,
 “ that the pannel, while she was with child, did reveal
 “ that she was so. In one instance, that of Janet Riddell,
 the thing is done in a form which makes the reason more pal-
 pable. “ And *separatim*, that part of the libel, viz. that in
 “ the time of the birth the pannel called not for help, (find
 “ it) relevant to infer an arbitrary punishment ; and sustain
 “ the defence proponed for the pannel, that she revealed her
 “ being with child, relevant to elide the capital punishment.”
 The instances are also numerous of arbitrary punishment,
 and often a very severe one, inflicted on a pannel, upon ver-
 dict returned to that effect in her favour. Margaret Pater-
 son, in these circumstances, was transported, November 24.
 1712. Christian Strachan had the same sentence on the
 same day. Elizabeth Johnston was adjudged to be twice
 scourged, March 8. 1715. Elizabeth Orrock had the same
 sentence on the 7th of the same month. Isobel Stirling was
 adjudged to be scourged, and to be confined in the house of
 correction for six months, November 21. 1726. Many in-
 stances more might easily be produced.

CHILD
 MURDER.

Dec. 29. 1701.

BUT though it be substantially just, that one who has been
 guilty of this misdemeanour, should not be dismissed with-
 out some censure ; yet with respect to the matter of form,
 it may seem more questionable, whether it be a correct or
 regular course, thus to restrict a libel laid upon the act 1690.
 Such a libel is a charge of the crime of murder only ; and
 the terms of that enactment are, as it were, an interlocutor
 of relevancy on the presumptions of guilt related in the
 libel. If they be all proved, then must the jury find the
 pannel guilty of this constructive murder ; and if any one
 be wanting, as plain it seems to be, that a verdict of *not guilty*,

Disclosure of
 Pregnancy, its
 Effects.

CHAP. VI.

or *not proved*, ought to be returned. If, instead of this, the jury return a special verdict, finding some of these presumptions proved, and some of them not, no judgment can regularly pass upon it, but to *assailzie*; because the charge has no relation to any inferior offence, but to the crime of murder only, and to the statutory mode of proof, which is an instituted matter, and distinct from every other. The finding of previous relevancies for arbitrary punishment on the several presumptions separately, and in the view of verdict being returned in these partial terms, seems, therefore, to have been somewhat a loose and inaccurate practice. To authorise an interlocutor of that sort, the libel, both in the *major* and *minor* proposition, ought to bear a distinct charge of the failure to call for assistance in the birth as a separate offence, and liable to its proper penalty.

Nov. 18. 1734.

ACCORDINGLY, it is now some time since this form of interlocutor was discontinued. In the case of Jean Cowan, the revealing, equally as the calling for help, was found relevant entirely to *elide* the charge¹. This judgment was repeated in the case of Margaret Stuart, where the form of the interlocutor is said to have undergone a thorough discussion, in the view of fixing a rule for the future². The style of words

Mar. 22. 1743.

¹ But for *eliding* this last relevancy, (*i. e.* on the statute), sustain the defence, that the pannel did reveal her being with child, or did call for help in the birth.

² " *Separatim*, find the pannel her having, time and place libelled, brought forth a child, which was thereafter amissing or found dead; and that the pannel during the whole time of her pregnancy, did conceal her being with child, and did not call for help or assistance at the time of the birth, relevant to infer the pains of law; and for *eliding* this last mentioned article of the judgment, sustain the defence, that the pannel, during her pregnancy, did reveal her being with child."

words devised on that occasion, was precisely followed in the case of Anne Morison. And I have not observed that in any later case, either any punishment is inflicted, or a relevancy to that purpose is found, on any of the many libels of this sort which have been in Court.

CHILD
MURDER.

Dec. 4. 1758.
and
Jan. 16. 1759.

THE statute requires one thing more, to make out the prosecutor's case; that the pannel have not called for, and made use of, help and assistance in the birth. For if the contrary be the case; if she reveal her pregnancy at this critical period, when it would most concern her to conceal it, if she had any evil purpose; she has therein furnished reasonable evidence, that her previous silence was owing to shame or other excusable motive, and not to any resolution against the child, which in the end she does all that in her lies to preserve: At least, it is evidence that if ever she harboured any such wicked purpose, she repented before it was too late. Besides; in this way, evidence is provided of the actual condition of the child at the birth, whether it be dead or alive.

Of the Failure
to call Help to
the Birth.

THE chief question which arises on this clause of the statute is, whether, to *elide* the charge, the pannel has to prove that she both called for and made use of help in the birth? or if it be sufficient that she send for help, although in the end she do not make use of it? This seems to be a question upon the case; and which cannot be decided by any one invariable rule. In general it is obvious, that the statute means to require such a course of conduct on the part of the mother, as defeats the presumption against her from the concealment of her pregnancy, and bears earnest of a fair intention towards the child, at the time of her labour. Put the case there-

Of the Failure
to call for Help
to the Birth.

CHAP. VI.

fore, that having fallen in labour, the pannel discloses her pregnancy, till then carefully concealed, to the only person who is in the house with her at the time, and dispatches her to some distance for a midwife. When they arrive, the child is missing; and the mother refuses to say what has become of it. Certainly this case is under the statute. For though she has called for assistance to the birth, and has thereby revealed her pregnancy, it is in such a way as bears evidence of her hostile disposition to the child, and shows that her whole conduct was no other than a contrivance to get rid of this troublesome witness, the more easily to destroy it. Or again; if, on their arrival, the messenger and midwife find the door of the house shut against them, so that after much delay they are obliged to force entrance; and if they find the body of the child concealed within the house, though not bearing marks of violence; here too the real motive of the pretended call for assistance is sufficiently explained, to deprive the pannel of all benefit from this defence¹. The case would not be more favourable to her, if on coming to the house they should find the door open, and the woman

¹ Elizabeth Johnston, being with child, went to the house of Isobel Crawford, to whom she revealed her condition. When near her time, she set out along with Crawford, on the road for England, meaning to bear the child there; but was taken ill by the way, and was delivered in the fields, with the assistance of Crawford, who dressed the child, and carried it back to, or at least upon the way to her own house; but soon after, exposed it in the fields, where it was found dead. Libel was laid against these women, both on the act 1690, and at common law. Afterwards, the prosecutor restricted the libel to an arbitrary pain. In these terms, it was found relevant; and the women, being convicted, were condemned to be whipped and banished, November 9. 1702. It seems very doubtful, whether the act applies to such a case at all; for it does not appear that the mother revealed, and took assistance, *at first*, for her own sake only, and with a view to destroy the child upon the birth. If that had been the shape of the case, it would have been attended with more difficulty.

woman abroad, and upon search should discover her in the fields, and the dead body in her possession, or hidden there in some secret place.

CHILD
MURDER.

IF, on the contrary, they get ready entrance of the house, and find the body of the child openly exposed in the same apartment with the mother, who says that it was still-born, or that it perished in the birth for want of help, the case seems as clearly not to be within the statute. She has shewn her disposition to save the child at this critical time, how blameable soever before; and the body is here patent to immediate inspection, whereby it may be judged, whether her story be true or false. The case of Agnes Scott was nearly of this description. She pleaded, that her pains came on her suddenly, about a month before the full time, owing to excess of work as a reaper in the fields; and that she sent a girl of seven or eight years of age, the only person who was in the house with her at the time, for a midwife. Meanwhile, she was delivered, as she said, of a dead and immature child, which she showed to the midwife on her coming. In these circumstances, the Lord Advocate consented to her banishment; which was a course of lenity not so common at that time as it has since become. A defence of the same sort was stated for Elizabeth Stirling. She related, that being seized with her pains, she requested help of certain persons, who accordingly came to attend her; but that these persons having left her, in the opinion that her time was not yet come, she was afterwards, in their absence, suddenly taken ill, and was delivered of a dead child. The Court found it relevant, in general terms, that she called for help in the birth. But the verdict on this point was against her¹.

Of the Failure
to call for Help
to the Birth.

Mar. 6. & 12.
1700.

Nov. 7. & 14.
1726.

IN

¹ One of the most singular cases in the record, is that of Jean Riddell, March 3. 1704. Being suspected to be with child, she was conveyed from one place to another.

CHAP. VI.

Calling for
Help; its Effect.

July 5. & 6.
1762.

Nov. 7. & 14.
1726.

IN regard to the benefit of this defence; there is a plain reason why it must always have been greater than that of revealing the pregnancy. Though the pannel have revealed, she is still liable to the charge of criminal neglect with respect to the time of birth; whereas the calling for assistance on that occasion not only reveals the pregnancy, but reveals it at the very time when the disclosure is of greatest service to the child, and gives the fullest assurance of the mother's resolution to preserve it; since, if any harm were meant it, this were the season when the most anxious concealment would be used. Accordingly, there is no instance of any sentence following on verdict finding this defence proved, nor of interlocutor restricting the libel to an arbitrary punishment upon such a ground. Indeed, the interlocutor in the case of Anne Davidson, expressly finds this defence relevant to elide the libel. And in that of Isobel Stirling, the distinction is pointedly made between the two defences, by sustaining the one as relevant to elide, and the other to restrict only¹.

THESE

another upon a sledge, for examination, or some such purpose. It appears from the proof, that she was delivered in the course of conveyance upon this sledge, among some straw, and in the presence, but without the knowledge, of two men and two women, who were conducting her. The discovery was made, by one of the child's feet appearing through the straw. She was convicted, and had sentence of death.

¹ " The Lords find the libel, as founded on the act of Parliament 1690 libelled on, relevant to infer the pains of death and confiscation of moveables: " But for *eliding simpliciter* the foresaid relevancy, sustain this defence, *viz.* " that the said pannel called for help and assistance to her the time of her " birth; and for *restricting* the foresaid relevancy to an arbitrary punishment, " sustain this defence, *viz.* that the pannel while she was with the said child did " reveal to others that she was so."

THESE being the qualities which the statute has expressly required in the charge, does it farther lie on the prosecutor to prove, that the child was a ripe child, produced at the full time, and born alive? This is not by any means the rule. It was, on the contrary, here,—in the difficulty of bringing such a proof,—that the main inducement lay to the passing of such a statute. If the body were missing, or were not found until dissolved by time, the prosecutor was excluded from all the means of showing that the child was born alive; and as little could he prove the duration of the pregnancy, so as to show that it might be a living birth, in a situation where the fact itself of pregnancy is always studiously concealed. To relieve him, therefore, from this difficulty, and in consideration that the blameable conduct of the woman, in concealing her state, and refusing assistance, is the cause of this embarrassment, and is withal ground of suspicion against her; the statute has shifted this disadvantage in point of proof over to her side, and has made the inference against her, that the child *was* born alive, and *was* murdered by her the mother. This is plain from the expressions and whole context of the act, which declares, that in these circumstances, of concealed pregnancy and unassisted birth, the mother shall be reputed the *murderer* of her child that is found dead or is missing; in which it assumes and implies, that the child has once been alive, to be destroyed. Though it has occasionally been done, the prosecutor need not therefore attempt any proof, less or more, to that effect, (a proof, which is indeed impossible if the child be missing); nor need he even aver in his libel, that the pannel was delivered at the full time, or of a ripe or living child. Among the many interlocutors which have been pronounced on charges of this sort, (charges far more numerous than for any other kind of murder),

CHILD
MURDER.

Must the Child
be proved to be
ripe.

CHAP. VI.

Mar. 11. 1729.
Nov. 18. & 25.
1734.

Mar. 1. 1715.

Feb. 15. and
Mar. 8. 1720.
Mar. 22. 1743.

murder), there are, as far as I have observed, but two, which have any allusion to the maturity of the child; those in the case of Jean Davidson; and Jean Cowan; in both of which the prosecutor, having proof of the maturity of the child, had thought it proper to lay and circumscribe his libel in that manner; and in this the interlocutor naturally followed the libel. But in the case of Elizabeth Johnston, where the libel did not state the duration of the pregnancy, nor affirm that the child was ripe or born alive, or had come to that maturity that it might have life, the exception taken on that ground was, after full debate, repelled, and interlocutor was given in the ordinary style ¹, without any mention of ripe or living birth. The same objection was again repelled in the case of Helen Marshall ²; and a third time, in that of Margaret Stuart.

In

¹ The pannel argues thus, " That though the libel bears that the pannel concealed her being with child during the whole space, yet it does not condescend how long that space was. And no person can be tried for their life upon an indefinite libel. For if the concealment be for a month or two, it will not be contended that such a concealment, (although abortion had followed), would have fallen under the said act of Parliament. And yet that case would have fallen under the generality of the present libel. At least, the libel should have been, that the child was come to the maturity of a ripe child, so as to have life."

² " Find, that the said pannel having been *with child*, and concealing the same during the whole space, and not calling for nor making use of help in the birth, and that the child was found dead or amissing, jointly relevant to infer the foresaid pains." In this libel, certain circumstances were farther laid, for inferring the pannel to be the actual murderer of her child, independently of the presumption of the statute. Now, in sustaining *these*, the same interlocutor pointedly distinguishes, and requires proof of the child having been ripe, thus: " And, *separatim*, find the following facts, *viz.* That the pannel, the time foresaid, brought forth a *ripe* child as appeared, &c. relevant to infer the pannel's guilt of the said crime."

In several other cases, such as that of Anne Reid, this point after being started, is given up.

CHILD
MURDER.

Nov. 14. 1720.

What if the
Birth be proved
to be unripe.

BUT, although the Legislature have seen cause thus far to relieve the prosecutor, and to raise a presumption against the pannel, that the child was born alive; yet still it does not follow, (nor would such a purpose be reconcileable to justice), that this shall be an absolute presumption, which the pannel may not redargue by any proof on her part. If the body of the child has been found, and she will undertake to show, by the clear opinion of those who inspected it, (being competent judges of such a matter), that it was a mere abortion, and of such a period that it never could have been quick; certainly this is a relevant defence to elide the statute, and which she must be allowed to prove. Indeed, even by the older practice, it was sustained to lower the charge to an arbitrary pain, if the pannel, without saying that the child never had quickened, alleged that it was unripe, and born considerably before the full time: this probably, on a presumption that she had been suddenly taken with her pains, and that the child could not have survived. In the case, already quoted, of Margaret Crooks, the Court "sustain the defence of her having revealed her being with child; or, *separatim*, "her child not being brought to the full time, relevant to "restrict the crime as libelled to an arbitrary pain." In the case of Mary Nicol, who alleged that her delivery was in the sixth month, verdict was returned, finding the qualifications of the statute proved, but with this addition, "but "does not find it proven that the child was come to the "full time;" whereupon she had sentence to be scourged, and to be confined three years in the house of correction.

July 28. and
Aug. 5. 1718.

Feb. 12. & 13.
1705.

CHAP. VI.

Mar. 3. 1709.

tion¹. Again; it was sustained to restrict the libel against Marion Burnet, that she had revealed her pregnancy to the father of the child, *and* that she had not gone to the full time. On the 20th December 1700, Jean Hay was convicted on her own confession, which bore, that she concealed her pregnancy, and did not call for help, but that the child was still-born, and born long before the time: She was adjudged to be scourged and banished.

Is the statutory
Presumption ab-
solute in all
Cases?

Mar. 1. 1715.

FARTHER still; though the child be born at the full time, yet neither is the presumption absolute against the mother, in every case, that it must have been killed by her. For what if she be delivered of it at a time when she is delirious from disease, and incapable of calling for help either to the child or to herself? This was found relevant to restrict, in the case of Elizabeth Johnston. Or what if she allege, that recently before her delivery she received such blows and injuries as might probably destroy the child in the womb, and show proof of this upon the body of the child, as bearing the plain marks of a dead birth? In short, the statute has authorised to convict on a certain sort of presumptive proof; but which, like all proof of that kind, is liable to be outweighed by evidence of such things, as are naturally exclusive of guilt.

Form of Inter-
locutor on the
Charge.

THE result of these several considerations is, that, contrary to the ordinary practice of the Court, an articulate interlocutor of relevancy is pronounced on the charge; which, since 1743, has

¹ The expressions of this verdict are incorrect, and at first sight seem to lay upon the prosecutor the burden of proving that the child was ripe. But the real meaning was to find *negative* upon that article, in favour of the woman.

has ordinarily been expressed in these or the like terms:
 " Find that the said pannel having, time and place libelled,
 " brought forth a child, which was thereafter found dead ;
 " *and* that during the whole space of her pregnancy she did
 " conceal her being with child ; *and* that she did not call for
 " help or assistance at the time of the birth ; relevant to infer
 " the pains of death ; but for *eliding* this article of the indict-
 " ment, allow the pannel to prove, that during her preg-
 " nancy she revealed her being with child." A proof of
 all facts and circumstances, to exculpate or alleviate, is at
 the same time allowed. In some instances ; such as that of
 Janet Heatly, March 3. 1761,—of Anne Davidson, July 5.
 and 6. 1762,—and of Anne Mackie, August 5. 1776 ; notice
 is also taken of the calling for help as relevant to exculpate :
 but this is implied, when the same is found as to the article
 of revealing.

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MURDER.

IN regard to the persons who may be the objects of this sort
 of prosecution ; the only controversy which has occurred, is
 concerning married women, whether they were meant to be
 included under the sanction of the law. This plea was first
 started in the trial of Catharine Smith ; and there, (but whe-
 ther for this or for other reasons cannot be said), the prosecu-
 tor, in the end, thought it proper to restrict his charge. But
 though it be probable, that the Legislature had chiefly in
 view the case of single women, as those who more frequent-
 ly are under the temptation of concealment ; yet there are
 no words in the statute to authorise the making an exception
 in favour of a married woman, in any case where the pre-
 sumption will suit her condition. Such it is, and one indeed
 to which all the reasons of the law more especially apply,
 if she become pregnant in the absence of her husband.

Does the Act
apply to married
Women ?

Nov. 3. & 24.
1701.

CHAP. VI.
 July 20. and
 Aug. 3. 1724.

The libel was accordingly found relevant in the case of Margaret Dickson, which was of this precise description; and she was convicted, and executed. It is even a possible case, that a married woman may be interested to conceal and destroy her infant, though she be cohabiting with her husband at the time. This will be true, if she was already with child to another person, and some months advanced in her pregnancy, at the time of her marriage; or if she have become pregnant during the absence of her husband, and her time of delivery be so near his return, that the child cannot pass for his. But no case of this extraordinary description has yet been tried, though I find that the situation had once occurred. For on the 19th November 1711, Barbara Taylor offers a petition for bail; which bears, that she stood committed on a charge of murdering her infant, brought to the world within five months after her marriage. This petition is refused, though her husband concurs in it, and sets forth, that he has no doubt of the child being his, and that she had revealed her situation to him some time before.

Charge on the
 Act 1690, does
 it allow Art and
 Part?

I HAVE now nothing more to add respecting the nature of a libel on the act 1690; if it be not that it is in the singular situation in the law, of not admitting a charge of *art and part*. The statute, in its whole strain and context, has immediate relation to the mother alone, who is supposed to be the one person in the world, that is conscious of the wicked purpose. If, therefore, the case should happen, that she calls assistance to the birth, but on her own account only, and not to preserve, but to destroy the child; which with the aid of this associate she does; the associate must be tried by the ordinary rules of law, as for the actual murder.

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MURDER.

der. In one instance, a trial on the statute had, however, been attempted. On the 14th November 1720, Anne Brown was indicted on the act 1690, for the murder of her child; and in the same libel, William Reid, the alleged father, was indicted, "as art and part with the said Anne Brown in the "said murder; at least as accessary to her bringing forth the "said child without calling for or making use of help, and "burying the same in the trench of the Citadel of Leith; in "so far as," &c. Certain circumstances are afterwards charged to infer his participation of the murder; such as his scandalous conversation with the mother till near the time of her delivery, his concealment of certain linens when she was imprisoned, and the like. This mode of charge was objected to on the part of both pannels, as incompetent and contradictory. And although, in his information, the prosecutor abandoned the charge of art and part, and only insisted on the criminal conversation and concealment of the linens, as separate crimes of their own sort, and relevant to infer an arbitrary pain; yet, in the end, it was judged necessary entirely to desert this libel, and indict the woman, singly, of new. She was convicted and executed. But there were no farther proceedings against Reid.

Dec. 19. & 30.
1720.

THE act 1690 concludes with a provision, very proper to be made on such an occasion, for the due notification of this new law to the inhabitants of the land, by publication of the act, at the market-cross of the head burgh of every shire, and by reading at the church of every parish. But it has repeatedly been found, and especially in the case of Orrock and Johnston, in March 1715, that it is not necessary for the prosecutor to aver that any such promulgation was made. It has been argued, that this provision was at any rate only added *ob ma-*

Promulgation of
the Act 1690.

jorem

CHAP. VI.

jorem cautelam, and not as a condition of the law. But concerning this it is needless to inquire at the present day, after the statute has for more than a century been put to execution.

I HERE close my analysis of this rigorous edict. Yet it is difficult to dismish the subject, without taking notice of the great number of capital sentences which have been pronounced, and I am afraid executed, on the statutory evidence alone¹. Such, indeed, was the facility of conviction laid open by the statute, as had at one time betrayed both prosecutor and Judges, into a degree of slovenliness, and of indecent haste, in trials for child-murder, to which I find nothing to be compared with respect to any other article of our criminal system. Of this I need give no stronger proof than the practice, which was far from uncommon, of carrying on sundry trials for child-murder, in one sitting, and before the same assize, who inclosed, and returned their verdicts on the several libels into Court, at one time². The latest conviction on the statute, was that of Anne Mackie, on the 5th of August 1776. Of late years, in cases where the charge has been upon the statute only, and which have otherwise been favourable to the pannel,

it

¹ In the case of Anne Davidson, July 5. 6. 1762, an eminent physician and man-midwife, (Dr Young), swore, that the swimming of the lungs was not a certain symptom of living birth: For that this would happen if the child gave but a single sob, though it died in the birth; and that it might also be the effect of putrefaction. Mr Alexander Wood, surgeon, also swore, that at the distance of eight or ten days, there are no certain symptoms by which physicians can say, whether the child was born to the full time or not. See the above quoted paper of Dr Hunter's, to the same effect.

² On the 3d March 17c9, Bessy Turnbull, Isobel Taylor, Margaret Inglis, each for murdering her own child, are sent to one assize, who convict two of them.

it has been common for the prosecutor to consent to the panel's petition, praying to be banished forth of Scotland, or for other arbitrary punishment.

CHILD
MURDER.

IN the way of Appendix to this of child-murder, I shall here subjoin a few words concerning another very frequent offence against infant children, and which too, may sometimes issue in their death: I mean, the desertion and exposure of them to the risk of what may happen. One can imagine cases of exposure, (and such have already been taken notice of), which seem more properly to be cases of murder, if the death of the infant shall ensue, than of any inferior offence. But even where the child is not abandoned in such a way as bears evidence of a resolution to destroy it; still for the mother to desert her helpless issue, and expose it to any material risk of perishing, though it should not die in consequence, and much more where it does, cannot but be construed a high crime. Indeed, if the child die, though only accidentally, and by connection with the exposure; as if it be exposed in a field, and is killed by the cattle treading on it, or on a highway, and is crushed to death by a carriage running over it; the crime seems to be no other than a species of culpable homicide. Mary Graham was indicted for incest, and for the exposure of her new born child, "naked as it came into the world," in a field of corn, where it was afterwards found dead. The Court found this part of the charge, (though certainly not very remote from murder), relevant to infer an arbitrary punishment; and being convicted on her own confession¹, she was sentenced to be scourged, and to be confined

Of the Exposure of Infant Children.

Dec. 21. 1703.

¹ Her confession bore, "That she did expose and lay it out, naked as it was born, amongst the corn, immediately after the birth."

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July 9. 22. 23.

26. 1754.

confined in the house of correction, till the magistrates of the burgh should dispose of her. The case of Isobel Kilgour, which also issued in a sentence of scourging and banishment, was nearly of the same description. In the month of March, and about five of the evening, and in severe weather, she had exposed her child, of about three weeks old, upon a sandy bank near the road from Inveresk to Leith, and had there left it, stuffed into a rabbit's hole, (as appears on the proof), with its head inwards, and the sand gathered up to the mouth of the hole, so that the body lay for ten or twelve days unobserved. The libel was laid as for murder¹, and was found relevant, in general terms, to infer the pains of law. The jury found her "guilty of *exposing* her child *in terms of the libel*, which "was the cause of the child's death." Now, the libel did not relate some of the strong circumstances above mentioned, and bore an alternative charge, of *putting the child into a hole*, or *leaving it exposed upon the ground*. On this reference in the verdict to the libel, the Court could do no other than adopt the more favourable account of an exposure *upon the ground*, and at no great distance from a highway. And thus the pannel's life was saved.

Of Self-Murder.

I HAVE followed the example of Mackenzie, in reserving self-murder (though there is very little to be said on it), as the subject of a separate article; being an offence, of

¹ "And there murdered the foresaid child, by putting it into a hole in a sandy bank, near to the road leading from Inveresk to Leith, where it died immediately, or soon thereafter. At least, time and place foresaid, she left the said child *upon the foresaid ground*, exposed to the cold at that season of the year, where it died in a short space thereafter, and in which place its dead body was found." It concludes thus: "At least, time and place foresaid, the said child was murdered, or *left upon the ground*, exposed to the cold, without any help or assistance, whereby it died immediately, or soon thereafter."

SELF
MURDER.

of a nature quite distinct from any other instance of homicide. Though it may be contrary to popular belief, there seems to be no law, nor practice¹, for inflicting any indignity on the remains of those unfortunate persons, who finish their course in this unnatural way. But according to all authorities², the ordinary patrimonial consequence of homicide takes place against their executors, in the confiscation of all their moveable goods; which is made effectual on establishment of the fact, in an action of declarator before the Supreme Court. Craig has mentioned the case of Thomas Dobbie, in which it was judged, that even the plea of madness is not relevant to hinder this penalty from taking place, "*Neque insanix objectio recepta, cum nemo sanus id faceret.*" But this seems to be an insufficient reason; and all later authorities have held that judgment to be wrong.

¹ See on this head the judicious opinion given in the case of Mungo Campbell. Maclaurin, p. 531.

² See Skene's Treatise of Crimes. Craig, lib. 1. dieg. 16. No. 32.; lib. 3. dieg. 6. No. 18.

AGAINST THE PERSON.

SELF
MURDER.

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See on this head the judicious opinion given in the case of Mingo Campbell. Maclean, p. 231.

See Skene's Treatise of Crimes. Craig has a chapter, No. 37, lib. 2, ch. 6, No. 12.

END OF VOLUME FIRST.